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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

~~1971~~ 70-155

No. _____

RAYMOND G. DEVERS

and

BRYAN D. WEBSTER

Petitioners,

v.

STATE OF MARYLAND

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

ARTHUR DALE LEACH
916 Northwest Drive
Silver Spring, Maryland
Attorney for Petitioners

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland, entered in the above-entitled case on February 9, 1971.

I. OPINIONS BELOW

Opinions of the Courts of Maryland are set forth in Appendices A, B and C.

A. OPINION OF THE TRIAL COURT.

B. OPINION OF THE SPECIAL COURT OF APPEALS OF MARYLAND.

C. OPINION OF THE COURT OF APPEALS OF MARYLAND.

II. GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction in this Court is invoked under Title 28 U.S. Code §1257(3) and Rule 19 of the Rules of the Court.

The substantial federal question of "denial of due process" was raised and presented in the opinion of the Special Court of Appeals wherein this appellate court stated that the actions of the trial court in the application of the law had the effect of *denying the appellants due process of law.* The record as a whole shows expressly and by clear intendment that the due process question was an issue and was adequately presented which is sufficient for review by the Supreme Court. *New York ex rel. Bryant v. Zimmerman,* 1928, 49 S.Ct. 61, 63, 278 U.S. 63, 67, 73 L.Ed. 184, 62 A.L.R. 785; *Street v. New York,* 1969, 89 S.Ct. 1354, 1360-1362, 394 U.S. 576, 581-585, 22 L.Ed. 2d 572.

The Court of Appeals of Maryland, being the highest court of the state, quoted the Special Court of Appeals opinion with respect to the contention that "appellants were denied due process" of the law and did, in fact, consider this question and, therefore, this question is reviewable by the Supreme Court. As this court said in *Raley v. Ohio,* 1959, 79 S.Ct. 1257, 1265, 360 U.S. 423, 436, 3 L.Ed. 2d 1344:

> "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."

In this case, the protection of the federal Constitutional [14th Amendment] right of due process of the law, would be thwarted by the State of Maryland, speaking through the Court of Appeals, which has the last word in determining whether the petitioners were denied due process of the law under the 14th Amendment. In the instant case, a state statute is being applied in a constitutionally discriminatory fashion, the effect being that petitioners are effectively denied their constitutionally guaranteed rights. On this basis alone this is a matter subject to review by this court. *Zucht v. King*, 1922, 43 S.Ct. 24, 260 U.S. 174, 67 L.Ed. 194; *Charleston Federal Savings and Loan Association v. Alderson*, 1945, 65 S.Ct. 624, 324 U.S. 182, 89 L.Ed. 857.

III. QUESTION PRESENTED FOR REVIEW

Were the petitioners denied due process of the law guaranteed to them by the 14th Amendment to the Constitution of the United States because:

> (a) Improper factors influenced the Trial Court in denying petitioners' motion for judgment of acquittal resulting in substantial injustice to petitioners; and
>
> (b) Petitioners' motion for a new trial was denied by the Trial Court without applying the proper tests which resulted in a miscarriage of justice.

IV. CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Constitutional provision involved herein is that portion of the Fourteenth Amendment to the federal Constitution relating to the guarantee of due process of law to all citizens of the United States of America (Appendix D).

The statutes involved are Rules 755 and 759 of the Maryland Rules of Criminal Procedure and Article 27, Section

593 of the Annotated Code of Maryland; Rule 755 provides for a "Motion for Judgment of Acquittal" at the end of the state's case and at the end of the entire case; Rule 759 provides for a "Motion for a new trial" after verdict "if required in the interest of justice"; Art. 27 § 593 provides that "Jury to be judges of Law and Fact; Motion for judgment acquittal on ground of insufficiency of evidence." (Appendix E)

V. STATEMENT OF THE CASE

Petitioners, Raymond C. Devers and Bryan D. Webster, were charged with subornation of perjury and perjury, respectively, in May of 1969 in connection with a February, 1969 trial arising out of certain domestic difficulties between Raymond G. Devers and his wife.

Both cases were consolidated for trial and were tried before a jury in the Circuit Court for Prince George's County, Maryland, on August 14 and 15, 1969. The Honorable William B. Bowie was the presiding judge at this two day trial. Charges involved certain perjury allegedly having been committed in testimony by the petitioners during an earlier trial (of a different case) on February 3, 1968, before the same court.

Pursuant to the Maryland Code 1957, Article 27, Section 593 and the Maryland Rules, Rule 755, petitioners during trial moved for a judgment of acquittal on the ground of insufficiency of the evidence at the close of the State's case, renewing such motion at the close of all the evidence. Petitioners appealed from the denial of these motions.

Subsequent to the return of the jury verdict and pursuant to Maryland Rule 759-a, petitioners timely moved for a new trial on the grounds of (1) insufficiency of the evidence to sustain the verdict, (2) the verdict was against the weight of the evidence, and (3) the verdict was contrary to the evidence and shocking to the conscience of the court, being a miscarriage of justice. A hearing on the motion for the new

trial was held on September 10, 1969. Following the denial of these motions, the petitioners noted their appeals to the Maryland Court of Special Appeals.

The Maryland Court of Special Appeals reversed the convictions of the petitioners and ordered a new trial ruling specifically that the petitioners, Raymond G. Devers and Bryan D. Webster, *were denied due process of the law* because (1) improper factors influenced the court in denying their motion for judgment of acquittal to such an extent that the petitioners were denied due process and (2) the petitioners' motion for a new trial was denied by the trial court without applying the proper tests.

Following this reversal by the Court of Special Appeals, the State was granted a writ of certiorari which brought this case before the Court of Appeals of Maryland.

The Court of Appeals of Maryland handed down an opinion on January 8, 1971 reversing the decision of the Special Court of Appeals and reinstating the jury verdicts and holding that the petitioners were not denied due process of the law as set forth above. A motion for a rehearing was denied on February 9, 1971 and a notice of appeal to the Supreme Court of the United States was noted on February 9, 1971. On this same date the Court of Appeals signed an order staying the mandate in this matter pending application for review of the decision of the Maryland Court by the Supreme Court of the United States, and until final decision by that court unless otherwise ordered by the Maryland Court or by the Supreme Court of the United States.

It is these series of trials which brings this matter before the court on the petition for a writ of certiorari.

VI. STATEMENT OF FACTS

A. *Identity of Petitioners.*

1. The petitioners, Raymond G. Devers, is a married man, 37 years of age, and a respected resident of Price George's County, Maryland for many years. Mr. Devers has not been previously convicted of any crime, either in the State of Maryland or in any other state, and does not have a criminal record.

2. The petitioner, Brian D. Webster, is a resident for many years of Prince George's County, Maryland. Mr. Webster has been for many years a notary public for the State of Maryland, and a licensed bonded real estate salesman. Mr. Webster has not been previously convicted of any crime either in the State of Maryland or in any other state and does not have a criminal record.

B. *History of Litigation.*

Raymond G. Devers and Bryan D. Webster were jointly tried before a jury in the Circuit Court for Prince George's County. Devers was found guilty of subornation of perjury and Webster of perjury. In *Devers and Webster v. State,* 9 Md. App. 366, 264 A.2d 261 (1970), the Court of Special Appeals reversed the convictions because it found error and a denial of due process of law in the trial court's denial of motions for judgments of acquittal and for a new trial and remanded the cases for a retrial. The Court of Appeals granted certiorari, and, in an opinion dated January 8, 1971, reversed the Court of Special Appeals and reinstated the convictions.

Devers' and Webster's convictions were the end product of a domestic dispute between Devers and his wife. In August, 1968, Mrs. Devers had left her husband and had gone to live with Mrs. Bernice Anderson. During the period from September to December 1968, Mrs. Devers or Mrs. Anderson had sworn out four criminal warrants, charging Devers with stealing his own lawnmower, disorderly conduct, disturbing the peace and making harassing telephone calls on

29 November and 23 December 1968, the latter charge being in violation of Code (1957, 1967 Repl. Vol.) Art. 27, §555A.

These four charges came on for trial in February 1969 in the Circuit Court for Prince George's County before Judge William B. Bowie, and a jury. At the conclusion of the State's case, motions for judgments of acquittal were granted as to all the charges except that involving the telephone calls allegedly made at 7:35 and at 9:10 on the evening of 29 November, which Devers then defended. Webster, called as a witness in Devers' behalf, testified that on the day when the telephone calls were alleged to have been made, he had flown Devers to Hancock, West Virginia, leaving Hyde Field in Prince George's County at approximately 12:30 p.m. and returning to the field at approximately 8:30 p.m. On cross examination, Webster testified [without checking his work record] that he had not worked at the Chesapeake and Potomac Telephone Company in Silver Spring, Maryland, where he was employed, on 29 November. He said that he had worked on the 28th, which was Thanksgiving Day, but that he was "off" on the 29th. Devers then took the stand and confirmed the story of the trip. The jury returned a verdict of not guilty.

Subsequently, Webster was indicted for perjury and Devers for subornation of perjury. The cases came on for trial in August, 1969, again before the Honorable William B. Bowie, and a jury.

C. *Testimony in the Instant Case.*

There was testimony which both discredited and supported Devers' alibi and the State's case. Both Mrs. Devers and Mrs. Anderson testified that they had recognized Devers' voice when the telephone calls were made. Mrs. Devers testified that she had seen her husband about 6 p.m. on 29 November in Lyle's Restaurant and again later that evening when he attempted to run his car into hers. However, she gave conflicting testimony as to the time of these occurrences. Mrs. Anderson said she had not seen Devers but

had seen his car chasing Mrs. Devers', when she opened the garage doors to admit Mrs. Devers' car. She gave a different time for the car chase [which Devers denied].

Herbert Palm, a telephone company foreman, testified that the company's work schedule showed that Webster had not worked on Thanksgiving Day, but had worked on the 4:00 p.m. to midnight shift on Friday, 29 November, and that a timecard, signed by Webster, bore this out. On cross examination he admitted that the *Telephone Company records only indicated that Mr. Webster reported that he worked 8 hours on November 29*, 1968. He stated that he *personally did not know whether Mr. Webster worked on that date* in that he would not have been back until the following Monday to check on any records. He stated that Webster was scheduled to work the 4 to 12 shift but that the records did not indicate when Webster started work and when he stopped work. *He testified that errors are made in the Company records from time to time* and that these Company records are unsworn handwritten reports. *He admitted that Mr. Webster could have worked on November 29, coming in late and working for a longer period on the other end of his shift, and thus obtain his 8 hours of work which he reported for that date.*

Edna May Rittershofer, a payroll processing supervisor for the telephone company, testified that the company's records showed that Webster had a holiday on Thanksgiving and worked on 29 November. Had he worked on Thanksgiving, he would have received $40 additional pay, which he had never claimed. On cross examination she stated that these unsworn records only show that he worked 8 hours and did not give the beginning and ending time of the 8 hour period. She admitted that Mr. Bryan Webster could have worked on November 29 as far as her records are concerned.

Creston Garner, Jr., Webster's immediate supervisor, called as a rebuttal witness by the State, testified that Webster was a switchman, "scheduled" to work on the 4:00 p.m. to mid-

night shift on 29 November; that two switchmen are the minimum who must be on duty; that between 4:00 p.m. and 5:00 p.m. each day, it is his practice to verify that they are on duty, and that if Webster had not reported by 5:00 p.m. on 29 November he would have "panicked immediately" and made a record of the fact, which he had not. On cross examination *he admitted that he did not personally see Webster on the job at that time. He also conceded that Webster could have arrived late and worked his full 8 hours without anyone noticing a difference. He further conceded that this change of beginning and stopping time would not have been shown or reflected in the Company records.*

D. *Defense Case.*

There was considerable testimony by eight witnesses adduced in support of the alibi. No witness testified that he had seen Webster at work, although Webster conceded that it was improbable that he would not have been seen by the other switchman. Terry Harden, whose mother had previously stayed at Devers' house, testified that he had met Devers and Webster at Lyle's Steak House on the morning of 29 November and had left Hyde Field with them at 11:30 a.m. in Webster's plane to fly to West Virginia to look at some family properties. He took them to the West Virginia airport about 7:00 p.m., but did not return with them.

Stephen E. Ellis testified that he saw the plane leave Hyde Field at 12:30. There was introduced in evidence Webster's pilot log, which contained an entry indicating that the trip was made on November 29. Webster admitted that the entry had been made sometime later.

Vivian Springman, a practical nurse, worked for a registry run by Mrs. Lois Zagri. She testified that she and Mrs. Zagri had made an appointment to see Devers at Devers' house at 7:30 p.m. on 29 November. They went to Devers' house, and finding him not there, drove to Hyde Field where Webster's plane arrived at about 8:30 p.m. Devers took Webster somewhere, and then returned to his house

where he again met Vivian Springman and Mrs. Zagri. Mrs. Zagri substantiated this testimony.

Webster repeated the testimony which he had given at the earlier trial concerning the trip to West Virginia, but explained that he had reported for work about 11:00 p.m. on 29 November, and had worked the eight hours shown on his timecard by staying on the job until 6:30 a.m. He admitted that he had been *mistaken* when he testified at the earlier trial that he had worked on Thanksgiving.

State trooper Alban Smith and a Mr. Frank Dillon testified by way of impeachment of Barbara Devers' testimony.

Devers reiterated the testimony he had given at the earlier trial about the trip to West Virginia, and denied that he had seen his wife at Lyle's Steak House, or had attempted to run her off the road.

E. *Statements and Findings by the Court on the Record.*

Just before the State put on Creston Garner, Jr., as a rebuttal witness, counsel had a conference with Judge Bowie in chambers at the request of the State. There were present James E. Fannon, Jr., Assistant State's Attorney; Vincent J. Femia, Assistant State's Attorney; James E. Kenkel, Deputy State's Attorney, and Arthur Dale Leach, counsel for the defendants. The defense had rested its case. The purpose of the conference was the State's desire to obtain a continuance so that an out of state rebuttal witness could be produced. In the course of a long conference and hearing on the record, which ultimately resulted in a denial of a continuance, Judge Bowie made several statements, findings and determinations:

No. 1 THE COURT: "* * *Now, Mr. Fannon [Assistant State's Attorney], let me say this, if this were the world's worst murder case, if this was a seriously involved case, *if it were not for the fact that I sat on these other cases and had thrown the other three out—there are certain indications that have come into this trial which indicate they weren't fully and*

completely resolved, which they were. Now, I am just trying to say that *that is the fact.* Here you have got a family squabble in here and *this case should never have gone to trial. If it weren't for the fact I sat on those other cases and if it weren't for my confidence the jury is going to acquit this man, I would give him a judgment of acquittal like that,* and there isn't a court attendant that doesn't feel the same way about it. I don't know what has got in your craw, but I think this is one good reason why everybody is going to go out of office, really I do. *I think this case is a disgrace. And I will say this to every one of you, it is an absolute disgrace.* * * *"

No. 2 THE COURT: We are going to go right into it, gentlemen. I know what you think is behind it. These men are charged with this one thing, and not for some other things that you think might be going on, or *other matters that have come to my attention out of the evidence as appeared in this trial.* But I can't be concerned about that, how somebody manages to revolve these things around. We are confronted with a rather narrow issue, a very narrow issue in this case, not what is involved in the other cases. *And to think the Grand Jury even considered these other two cases that this man is charged with is utterly fantastic, when title to the car and truck were in the wife's name. And you all are thinking of having him indicted for larceny, or whatever these pending cases are. If you come out with that, that will be just another proof to me you are going after—beating a dead horse.*

* * * * *

No. 3 THE COURT: Here you have got a situation, you have got a wife fighting a husband. So, we are going to dig a hole, and then we are going to go out and we are going to get a mother and a son and we are going to put them in that same hole. *We are going to cover it up and tell you all to go home and forget the whole thing. Now, that is just about what*

ought to be done. Now, what you are doing now is starting another family fight. The son comes down here and says that he remembered this and he remembered the dates. Now you want to bring in the mother to show that the son is a liar. Then you will be indicting him for perjury.

* * * * *

No. 4 MR. FEMIA: This is not the ordinary perjury case.

THE COURT: It sure isn't, *because I don't know why it was in here in the first place, and I don't know who instigated it, but it is certainly not the usual perjury case. A man comes in and explains, right or wrong, but by using his explanation he makes an honest recollection. Now, I don't think there is anything here but implication. There is no direct evidence that the man is lying. It is true you have got records from the company, but it is easily explained, as I see it, and I just think it is wrong.*

No. 5 THE COURT: No. No. No. The old lady that comes in with a reputation of a Seventh Day Adventist, and they don't even use lipstick, maybe they do a few other things, I don't know, but she is over in Montgomery County, she is in charge of an agency that lists registered nurses and practical nurses and other nurses, but the main business they do is practical nurses, she comes in with a white uniform, she has got her right hand all bandaged up, *and if there is any juror in the world who would disbelieve her I just would like to see it. And this other lady that came in and remembered her son's birthday, and testified that it was on that day. Gentlemen, I just don't think that this evidence—I don't see how anybody can turn it.*

No. 6 THE COURT: *Somebody says out of the courtroom—the rummors that go all over the courthouse about what is going on here,* and *about some other criminal case that was involved, but I must say we are here to try this one case.* And I will tell you if

I hadn't sat in those others—and the people involved on the other side, *there are such hard feelings by the phone company and by the people with Mrs. Devers, that the jury is going to get this case come no matter what. I am just going to let the jury determine it. I am not going to do it. But if I had to determine it I would throw it out in a minute.*

No. 7 THE COURT: *And the defense wanted to bring up the fact the phone company was vindictive and I wouldn't let them bring that in.*

MR. KENKEL: I think that is as improper as an innuendo coming from us.

THE COURT: I have been lenient to the other side because this is the defense. *The defense is that all this is is a family thing, and I think it makes sense.* And the jury that acquitted this man heard the same evidence, they heard the same story, with further explanation here, that they heard in the other case where the man was acquitted, and it is just all tied in.

But if this is the usual perjury case, *I don't know. I would like to see a more serious thing than this brought to trial on a question of perjury.* Now, if you have got him for other things that is not within my purview, but *I would have to say that to me it appears this family thing is what has caused all this.*

I remember when Mr. Anderson testified at the last trial, and I remember how inconsistent he was and how silly his testimony seemed to me to be. It was almost childish, the fact *that neighbors were interfering with family problems.*

* * * * *

When trial resumed, the State called one witness, Creston Garner, in rebuttal. His testimony was in substance cumulative and the court noted that it was not appropriate rebuttal.

THE COURT: *All you have done so far is repeat exactly what you did on direct examination, only you have got one more witness, which is certainly not proper rebuttal.*

This testimony closed the evidence and petitioners moved for judgment of acquittal. It was denied, and the case went to the jury, which returned guilty verdicts as to both men. Subsequently, petitioners' motion for a new trial was denied. In denying the motion the Court said:

> *—Now, they give as their third reason that it was shocking to the conscience of the Court. Well, if the verdict of the jury was shocking to the conscience of the Court, I don't know how the defendant can read the thoughts of the Court, but they have a right to allege anything they want.*
>
> *To be perfectly fair with the defendant, I would say that if I had been on the jury I would have decided it just the other way. I would have decided the defendants were not guilty. And I think it is fair to the defendants for the Court to bring this in whereas normally I would not do this, and* normally the Court would not express any opinion as to whether they agreed or disagreed with the verdict of the jury.

The petitioners were each sentenced to two years imprisonment. At the time of sentencing the Court made the following significant statement:

> The Court knows, as well as your counsel knows, of the undertones in these cases, but we are not here concerned with the undertones in the cases. And *because* of *these undertones* the *State would have the Court incarcerate you and your co-defendant on the other charge.* But the Court feels that in fairness to you we have to view this matter as we see it and not because of some implications that were made on the record in chambers during a break in the trial, or some statement that the State's Attorney has now made that the matter was instigated at the request of the Attorney General.
>
> *We remember the facts of the case very well, and sat in on the original trial when the jury found you not guilty. And the Court felt at the time the jury came in with this verdict, and still feels, that there*

was a question of dates involved here, somebody got mixed up, with the responsible people that you had as witnesses to corroborate what you had done on the date that you had done it, and had the State's evidence opposed to that from the phone company, and, apparently, this is the reason the jury convicted you. However, you do stand convicted, and the Court feels that under the circumstances you must have some control by the authorities.

* * * * *

VII. ARGUMENT

The petitioners were denied due process of the law guaranteed to them under the 14th Amendment of the United States Constitution in that

(a) *Improper factors influenced the trial court in denying their motion for judgment of acquittal; and*

(b) *Petitioners' motion for a new trial was denied by the trial court without applying the proper tests, thus abusing its discretion and resulting in a miscarriage of justice.*

A. *Appellate Decisions:*

The question presented before the court was considered by *two* appellate courts, namely the Special Court of Appeals of Maryland and the Court of Appeals of Maryland. These two appellate courts are in direct conflict with each other as to whether the petitioners were denied their rights to due process of the law by the actions of the trial court at the trial of this case in August of 1969. The opinions of these two appellate courts are diametrically opposed, the Special Court of Appeals stating that the petitioners were denied due process and the Court of Appeals taking the position that the trial court acted properly and did not deny due process.

B. *Review of Law and Facts:*

In making a determination of the due process question involved in this petition, the court *should review* the find-

ings of fact of the state court, this being essential to a determination of the due process question. In 1959 this court set forth its right to make an independent examination in reviewing the facts. In a unanimous decision in *Napue v. Illinois*, 1959, 79 S.Ct. 1173, 1178, 360 U.S. 264, 271, 3 L.Ed.2d 1217. The court said:

> "The duty of this court to make its own independent examination of the record, when federal constitutional deprivations are aledged, is clear, resting, as it does, when our solemn responsibilities for maintaining the Constitution inviolate."

In making such an independent examination the court recognizes that it is reviewing the facts. With respect to the reviewing of the facts the court stated in *Fiske v. Kansas*, 1927, 47 S.Ct. 655, 656, 274 U.S. 380, 385-386, 71 L.Ed. 1108

> "This court will review the findings of fact by a state court where a federal right has been denied as a result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts."

Certain very important facts will be set forth in the following argument at appropriate and relevant points to substantiate the improper actions of the trial court which petitioners intend deprives them of their due process of the law under the 14th Amendment.

C. *Due Process of the Law Under the 14th Amendment:*

The 14th Amendment to the Constitution of the United States provides:

> "Nor shall any state deprive any person of life, liberty, or property without due process of the law."

The persuasive function of this amendment is to exact from the states *observance of basic liberties. United States ex rel. Auld v. Warden of New Jersey State Penitentiary,*

187 F.2d 615. Due process of law cannot be denied for any purpose whatsoever. The concept is broad and sweeping, it may be contravened in various ways and forms. Due process has a dual significance as it pertains to procedure and substantive law. *Skinner v. State ex rel. Williamson*, 62 S.Ct. 1110, 316 U.S. 535, 86 L.Ed. 1655. It consists in the protection of the individual against "*arbitrary action*," the due process clause of the Fifth and Fourteenth Amendment are directed at the protection of the individual against governmental encroachment or arbitrary invasion of his life, liberty or property by each branch of the government including the judicial branch. *Curry v. McCanless*, 59 S.Ct. 900, 307 U.S. 357, 83 L.Ed. 1339, 123 A.L.R. 162; *Douglas v. City of Jeannette*, 130 F.2d 652, 657, affirmed 63 S.Ct. 877, 319 U.S. 157, 87 L.Ed. 1324.

The purpose of the due process provisions, as they relate to judicial procedure, is to "*ensure fundamental fairness*," *State v. Hedgebeth*, 68 S.Ct. 1185, 334 U.S. 806, 92 L. Ed. 1739, and to secure to all persons "*equal* and *impartial justice*." *Chambers v. State of Florida*, 60 S.Ct. 472, 309 U.S. 227, 84 L.Ed. 716. The guarantee of due process means that the "*fundamental principles of justice*" shall not be violated in the trial of any citizen; that the judicial system shall act to avert "*injustice*" or hardship. *Great Northern Railroad Company v. Sunburst Oil and Refining Company*, 53 S. Ct. 145, 287 U.S. 358, 77 L.Ed. 360, 15 A.L.R. 254; *State v. Rossie*, 43 A.2d 323.

This court has said that the test of due process is essentially a test of "*reasonableness*." Broadly speaking, due process of law is secured by laws operating all alike, and not subjecting the individual to the "*arbitrary*" exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Santiago v. People of Puerto Rico*, 154 F.2d 811. This requires essential "*fairness*" and justice in all judicial proceedings, and in determining whether such "*fairness*" and "*justice*" are present, the entire judicial process, including

review on appeal, must be considered. *United States ex rel. Marelia v. Burke*, 101 F. Supp. 615, affirmed, C.A., 197 F. 2d 856, cert. denied, 73 S.Ct. 110, 344 U.S. 868, 97 L.Ed. 673.

In a review of the Supreme Court cases which have dealt with this issue, the court has constantly and repeatedly declared that due process requires a *fair* and *impartial* trial, and that this fairness and impartiality must be full and complete., *United States v. Certain Parcels of Land in Prince George's County, Maryland*, D.C. Md., 40 F. Supp. 436. Thus trial must be adequate to safeguard the right for which the constitutional provision is invoked and be uniform and regular. *Anderson National Bank v. Luckett, Kentucky*, 64 S.Ct. 599, 321 U.S. 233, 88 L.Ed. 692, 151 A.L.R. A24.

Criminal prosecutions and convictions cannot be brought about by "*methods that offend a sense of justice.*" *Fisher v. Pace, Texas*, 69 S.Ct. 425, 336 U.S. 155, 93 L.Ed. 569. Accordingly, in any criminal case, the person accused may not be deprived of life, liberty or property except by due process of the law, even though he is guilty. *Rochin v. People of California*, 72 S.Ct. 205, 342 U.S. 165, 96 L.Ed. 183, 25 A.L.R.2d 1396; *Ex parte Sullivan*, 107 F. Supp. 514.

The conduct of the trial and the procedure used therein must not work a *denial of fundamental rights* of the accused which are included within the conception of due process. To permit this would violate the very essence of a scheme or ordered liberty and to continue it would violate the "*principle of justice and fair trial*" which is so rooted in the traditions and conscience of the people of the United States as to be ranked as a fundamental right. *Brown v. State of Mississippi*, 56 S.Ct. 461, 297 U.S. 278; 80 L.Ed. 682; *Bute v. People of State of Illinois*, 68 S.Ct. 763, 333 U.S. 640, 92 L.Ed. 986.

Due process of law in a criminal case requires not only a trial or hearing before judgment in condemnation, but also a fair and impartial trial or hearing. The trial court has the

duty to see that the guarantee of fair and impartial trials shall be upheld and sustained. This duty of seeing that the right to fair and impartial trial is protected and preserved inviolate falls in the first instance on the trial court, but when such court fails in performance thereof, it becomes the duty of the Supreme Court. *In re Murchison, Michigan*, 75 S.Ct. 623, 349 U.S. 133, 99 L.Ed. 942; *State v. Bouse*, 264 P.2d 800; *Brown v. State*, 266 P. 476.

In a long series of cases the Supreme Court has stated that the 14th Amendment is a protection against criminal trials in the state courts conducted in a manner which amounts to a disregard of that *fundamental fairness* essential to the very concept of justice and in a way that necessarily prevents a fair trial. *Adamson v. People of State of California*, 67 S.Ct. 1672, 332 U.S. 46, 91 L.Ed. 1903, 171 A.L.R. 1223; *Lyons v. State of Oklahoma*, 64 S.Ct. 1208, 322 U.S. 596, 88 L.Ed. 1481; *Lisemba v. People of State of California*, 62 S.Ct. 280, 314 U.S. 219, 86 L.Ed. 166. It is the contention of the petitioners on appeal that the trial court in the instant case conducted the trial in a manner which amounts to a disregard to the fundamental fairness essential to the very concept of justice in failing to grant a judgment of acquittal or a new trial after having stated on the record the *disgraceful nature of this trial*, affirming that it had no place in this court to begin with and that the trial judge would grant a judgment of acquittal in a minute if the court were not so sure that the jury would do so itself; thus, the trial court recognized the *basic unfairness and injustice which was taking place in the trial of this case;* that the court felt so strongly about this that the determinations and decisions with respect to the unfairness and disgracefulness of this trial were placed on the official record of the case, and yet, the trial court refused to exercise its prerogative as a "safety valve" and denied the motion for judgment of acquittal and the subsequent motion for a new trial; thus permitting a miscarriage of justice to be carried out, in the court's presence, while the trial court, in effect, endorsed this miscarriage of justice

and disgraceful trial by its failure to act to correct the injustice by granting of the aforesaid motions "*in the interest of justice*" as provided by Rule 759 of the Maryland Rules of Criminal Procedure (Appendix E).

D. *Improper Factors Influenced the Trial Court in Denying Petitioners' Motion for Judgment of Acquittal, Resulting in Substantial Injustice to Petitioners and a Denial of Due Process of the Law.*

It is the substance of Appellee's argument that: (1) despite the Court's denial of defendants' motion for a judgment of acquittal, the statements of the trial judge in the record necessarily indicate that the Court had in fact decided the evidence to be insufficient; that the trial court for reasons improper as a matter of law, denied Appellees' motion for a judgment of acquittal and such denial was error and a clear abuse of discretion, resulting in substantial injustice. to petitioners.

E. *The Court's Denial of Petitioners' Motion for Judgment of Acquittal Was an Error of Law and an Abuse of Discretion.*

For purposes of showing that the trial court had in fact decided and recognized that there was an insufficiency of evidence to establish the corpus delecti or essential elements of subornation of perjury; and that the trial court denied Petitioners' motions for a judgment of acquittal on grounds which were improper as a matter of law, reference will now be made again to statements by the trial judge during the trial and at the hearing of defendants' motion for a new trial.

At the close of the State's case, defendants below properly moved for a judgment of acquittal on the grounds of insufficiency of the evidence. The judge denied the motion stating, ". . . I feel there is a prima facie case here."

At the close of the defendants' case, the Deputy State's Attorney requested a conference and hearing in chambers.

The following proceedings were had, in relevant part, among those present, including the Honorable William B. Bowie, James E. Fannon, Esquire, Deputy State's Attorney, James E. Kenkel, Esquire, Chief Deputy State's Attorney, Vincent J. Fermia, Esquire, Assistant State's Attorney, and Arthur Dale Leach, Attorney for Defendant Raymond G. Devers and Bryan Webster.

"THE COURT: . . . All right, gentlemen, let the record show that the State has requested this conference in chambers, out of the presence of jury, and the Court has insisted the court reporter be present . . .

"Now, Mr. Fannon, let me say this, if this were the world's worst murder case, if this was a seriously involved case, if it were not for the fact that I sat on these other cases and had thrown the other three out—there are certain indications that have come into this trial which indicates they weren't fully and completely resolved, which they were. Now, I am just trying to say that that is the fact. Here you have got a family squabble in here and this case should never have gone to trial. If it weren't for the fact I sat on those other cases, and if it weren't for my confidence the jury is going to acquit this man, I would give him a judgment of acquittal like that, and there isn't a court attendant that doesn't feel the same way about it. I don't know what has got in your craw, but I think this is one good reason why everybody is going to go out of office, I really do. I think this case is a disgrace. And I will say this to every one of you, it is an absolute disgrace.

* * * * *

"THE COURT: Somebody says out of the courtroom—the rumors that go all over the courthouse about what is going on here, and about some other criminal case that was involved, but I must say we are here to try this one case. And I will tell you if I hadn't sat in those others—and the people involved on the other side, there are such hard feelings by

the phone company and by the people with Mrs. Devers, that the jury is going to get this case come no matter what. I am just going to let the jury determine it. I am not going to do it. But if I had to determine it I would throw it out in a minute."

* * * * *

"MR. FEMIA: This is not the ordinary perjury case.

"THE COURT: It sure isn't, because I don't know why it was in here in the first place, and I don't know who instigated it, but it is certainly not the usual perjury case. A man comes in and explains, right or wrong, but by using his explanation he makes an honest recollection. Now, I don't think there is anything here but implication. There is no direct evidence that the man is lying. It is true you have got records from the company, but it is easily explained, as I see it, and I just think it is wrong. (E. 45)

". . . And if you all have something else I just hope you have got more to go on than in this one." (T. 410).

At the close of the above-referred to proceedings in chambers the State called one additional witness in rebuttal. This witness presented no new evidence but was merely cumulative and corrabative of the previous Telephone Company records and not proper rebuttal or stated by the court. At the close of all the evidence, the defense renewed its motion for a judgment of acquittal on the ground of the insufficiency of the evidence, which the Court denied, stating:

"THE COURT: Well we think that nevertheless that has created a question of fact which the jury must resolve, as we had indicated in chambers when we were on the record. We feel that this case does present a question for the jury, a question of fact to determine whether or not the defendants are guilty as charged."

At the hearing on the defense motion for new trial, September 10, 1969, the denial of which is now being appealed, the relevant proceeding were as follows:

> "THE COURT: First of all, the defendants have brought their motion on three grounds, which, under the rules, they must state: First the weight and sufficiency of the evidence. We conclude that the weight and sufficiency of the evidence is for the jury to decide and not for the Court. Once the case goes to the jury, assuming that it properly is presented to the jury on a question of fact, then the weight and sufficiency of the evidence is totally for the jury and not for the Court. It is the responsibility of course, of the Court to determine, on a motion for judgment of acquittal at the end of the case, that they had presented sufficient to go to the jury and for the jury to consider it. Once this was done, of course, the weight and sufficiency was up to the jury." . . .
>
> . . . *"To be perfectly fair with the defendant, I would say that if I had been on the jury I would have decided it just the other way. I would have decided it just the other way. I would have decided the defendants were not guilty.* And I think it is fair to the defendants for the Court to bring this in whereas normally I would not do this, and normally the Court would not express any opinion as to whether they agreed or disagreed with the verdict of the jury. The point, however, has been raised in this motion for new trial, and again we come to that admonition that (the Court must not substitute its opinion for that of the jury on questions of fact. We think that the State did present sufficient evidence to allow it to go to the jury) and it went to the jury and the jury decided it that way. The fact that the Court might have decided it some other way really is not allowable as a reason for granting of a new trial because (we feel that once the case went to the jury to decide it was up to the jury to decide it either way.) They decided that the

defendants were guilty and we feel that the verdict must stand and for these reasons we deny the motion for new trial in each of the two cases. (E. 61, 63-64)

F. *Abuse of Discretion*

At the end of the State's case and at the close of all the evidence, the Court denied defendants' motion for a judgment of acquittal made on grounds of the insufficiency of the evidence. It must be presumed that the trial judge was aware that the trial court test as to the sufficiency of the evidence is whether the evidence either shows directly or supports a rational inference of facts to be proved, from which the trier of fact could fairly be convinced, beyond a reasonable doubt, of defendant's guilt of the offense charged. *Iozzi v. State*, 1968, 247 A.2d 758, 5 Md. App. 415; implicit in such denial, therefore, there would necessarily seem to be a finding by the Court that the evidence was sufficient for the purposes required by the test.

Statements by the Court during the trial clearly show, however, that the Court had, in fact, definitely determined the evidence to be insufficient for purposes of the motion; and that the Court's denials of motions for judgment of acquittal were not based on any consideration and finding of the sufficiency of the evidence, but were rather motivated by reasons improper as a matter of law; that these reasons were clearly errors of law and were abusive of the discretionary function of the trial judge.

At the previously excerpted conference in chambers, the trial judge made the following statements which Appellee relies on at this stage of the argument:

> "*If it weren't for the fact* I sat on those other cases, and if it weren't for my confidence that jury is going to acquit this man, *I would give him a judgment of acquittal like that* . . ." (E.) (emphasis supplied)
>
> ". . ! and the people involved on the other side, there are such hard feelings by the phone company and by

the people with Mrs. Devers, *that the jury is going to get this case no matter what. I am just going to let the jury determine it. I am not going to do it. But if I had to determine it I would throw it out in a minute.*" (E.) (emphasis supplied)

It cannot be correctly contended that these statements by the trial judge represent merely his personal and legally insignificant evaluation of the weight of the evidence presented or the credibility of the witnesses. The weight of the evidence and the credibility of witnesses are matters *exclusively* for the jury to determine. *Harris v. State*, 1969, 249 A.2d 723, 6 Md. App. 7; *Watson v. State*, 1969, 250 A.2d 311, 6 Md. App. 134. It was not within the power of the trial court to "give him a judgment of acquittal like that" (E.) based on the weight of the evidence and/or the credibility of the witnesses, as the trial judge must be presumed to have been aware at the time he made the above quoted statement. The Court can pass only on the sufficiency of the evidence to prove the facts, *Daniels v. State*, 1957, 131 A.2d 267, 213 Md. 90, and a judgment of acquittal cannot properly be granted on grounds other than the insufficiency of the evidence.

The trial judge must be presumed to have been aware that a judgment of acquittal cannot properly be granted on grounds other than the insufficiency of the evidence; therefore, the judge's statement that ". . . if it weren't for my confidence the jury is going to acquit this man, I would give him a judgment of acquittal like that" is necessarily a statement concerning the sufficiency of the evidence and an unavoidable judicial admission that the trial judge had already determined the evidence to be insufficient.

Other comments of the judge can reasonably be interpreted as Court expressions of *displeasure with the injustice and disgraceful nature of this prosecution*, such as ". . . I think this is one good reason why everybody is going to go out of office, really I do. I think this case is a disgrace. And I will say this to every one of you, it is an

absolute disgrace." (E. 43) But the words "*. . . if it weren't for my confidence that the jury is going to acquit this man, I would give him a judgment of acquittal like that . . .*" are not category of court opinion and to avoid the legal significance and necessary legal implication of such words one must ignore the obvious meaning of plain language on the one hand, while denying their ordinary legal effect on the other.

Further analysis of the Court's comments reveal the true outrage of this prosecution and additional error and abuse of discretion by the trial judge in failing to grant a motion for a judgment of acquittal.

On a motion for judgment of acquittal the Court can pass only on the sufficiency of the evidence to prove the facts, *Daniels v. State*, 1957, 131 A.2d 267, 213 Md. 90, and a judgment of acquittal cannot properly be granted or denied under any test other than the insufficiency or sufficiency of the evidence. The trial judge's statement that ". . . if it weren't for my confidence the jury is going to acquit this man, I would give him a judgment of acquittal like that . . ." (E. 43) indicates that even after an insufficiency of evidence had been determined by the judge to exist, a judgment of acquittal would not be granted because: (1) in his subjective estimate of the jury verdict, he had "confidence the jury is going to acquit this man," (2) the same judge had heard the prior case of Appellee Devers in February 1969, wherein the Appellee had been found not guilty of making harassing phone calls and the judge evidently felt that the Phone Company and wife of Appellee would be unhappy if *he* gave a directed verdict. The judge said "*If it weren't for the fact I sat on those other cases, and if it weren't for my confidence that the jury is going to acquit this man, I would give him a judgment of acquittal like that.*" (E.)

For a judge to deny a motion for judgment of acquittal despite the presence of the requisite insufficiency of evidence, because: (1) he had sat on a prior case, and (2)

because of his confidence in a jury acquittal, is clearly improper as a matter of law. The ill-founded and improper confidence of the trial judge in the jury severely prejudiced the defendant, was clearly erroneous, and clearly outside any discretionary power of the trial judge and resulted in a miscarriage of justice.

Further analysis brings to fore additional error. During the conference in chambers, the judge stated:

> ". . . *there are such hard feelings by the phone company and by the people with Mrs. Devers, that the jury is going to get this case come no matter what. I am just going to let the jury determine it. I am not going to do it. But if I had to determine it I would throw it out in a minute.*" (E. 46).

This statement clearly shows that despite the requisite insufficiency of the evidence which ordinarily would warrant a judgment of acquittal, *the judge had decided that he would not properly exercise his authority as trial judge and grant such an acquittal.* His reason for this failing to properly exercise his authority was "there are such hard feelings by the phone company and by the people with Mrs. Devers". This is clearly error. He apparently was fearful of going against the Telephone Company and the people with Mrs. Devers who presented "such hard feelings" about the case.

To effect his purpose and relieve himself of any responsibility in the matter, he decided that "the jury is going to get this case *no matter what.*"

Here we have the trial judge: (1) making an actual determination that there was an insuficiency of evidence upon which he could "throw it out in a minute," (2) but apparently being fearful of the Telephone Company and certain witnesses for the State, (3) and feeling certain the jury would acquit, he (4) determined that he would not act and properly grant a motion for a verdict of acquittal, but (5) decided to let the jury decide "no matter what."

This would indicate that the judge had abdicated from his clear authority to grant the motion and decided that he

would not properly exercise it "no matter what" happened in the trial. The jury was going to get the case in spite of the insufficiently of evidence or any other objections, "no matter what"—and they did. This is clearly error.

Acting accordingly, the trial judge denied defendants' motion for judgment of acquittal at the close of all the evidence, and despite its prior recognition of the insufficiency of the evidence allowed the case to go to the jury for reasons improper as a matter of law. Under the circumstances of this case, the denial of defendants' motion for judgment of acquittal was both clearly erroneous and clearly an abuse of the proper discretion of the trial judge, resulting in a denial of due process and substantial injustice.

G. *Petitioners' Motion for New Trial Was Denied by the Trial Court Without Applying the Proper Tests and Thereby Abused Its Discretion, Denied the Process, Resulting in a Miscarriage of Justice.*

The insufficiency of the evidence to sustain a conviction is a ground for a new trial, and, where the verdict of the jury is against the law in the opinion of the trial court, the court can remedy the error by granting a new trial, *Johnson v. State*, 1959, 150 A.2d 446, 219 Md. 481.

There can be little doubt that the ruling on a motion for a new trial is within the discretion of the lower court, Maryland Rules, Rule 759(a), and it will not be disturbed on appeal in the absence of abuse of discretion. *Clawns v. State*, 1941, 22 A.2d 464, 179 Md. 644. In the legal sense, discretion is abused whenever, in its exercise, the court has acted arbitrarily or has exceeded the bounds of reason in view of all the circumstances or has ignored or circumvented recognized principles of law so as to result in substantial injustice.

Appellees contend that such an abuse of the discretionary function of a trial judge is herein present. In chambers the judge stated, ". . . if it weren't for my confidence the jury is going to acquit this man, I would give him a judgment of

acquittal like that." Yet in denying the motion for a new trial, he stated:

> ". . . the Court must not substitute its opinion for that of the jury on questions of fact. We think that the State did present sufficient evidence to allow it to go to the jury . . . we feel that once the case went to the jury to decide it was up to the jury to decide it either way."

First, the judge erroneously refuses to properly decide a question of law because of confidence in the jury; then, the judge refuses to set aside the unjust effect resulting from his ill-founded confidence and once again refused to properly decide a question of law because of the jury's determination of fact.

H. *Failure to Grant a New Trial "In the Interest of Justice," Pursuant to Maryland Rule 759, Was a Clear Abuse of Discretion, Resulting in a Denial of Due Process and a Miscarriage of Justice.*

Maryland Rules of Criminal Procedure 759 (Appendix E) provides that a defendant may make a motion for a new trial after a verdict has been rendered against him. The statute provides "The court may grant a new trial if required in the interest of justice."

The following strong findings and determinations of the judge during the trial, and following the trial, can reasonably be interpreted as court expressions of displeasure with the injustice, unfairness and disgraceful nature of this prosecution and trial.

1. "This case should *never* have gone to trial."
2. "If it weren't for the fact I sat on those other cases, and if it weren't for my confidence the jury's going to acquit this man, *I would give him a judgment of acquittal like that* . . ."
3. "*I think this case is a disgrace. And I will say this to everyone of you, it is an absolute disgrace.*"

4. "We're going to cover it up and tell you all to go home and forget the whole thing. *Now that is just about what ought to be done.*" (402)
5. "I don't know *why it is here* in the first place." (405)
6. "A man comes in and explains, right or wrong, but by using his explanation, he makes an *honest recollection.* Now, I don't think there's anything here but implication. *There is no direct evidence that the man is lying.*" (405)
7. "It is true you got records from the company, but it is easily explained, as I see it, and *I just think it is wrong.*"
8. "In referring to the defendant's witnesses the court said, "And if there *is any juror in the world who would disbelieve her, I just would like to see it,* and this other lady that came in and remembered her son's birthday and testified that it was on that day. Gentlemen, I just don't think that this evidence– I don't see how anybody can turn it."
9. "And I will tell you if I hadn't sat in those others– and the people involved on the other side, there are *such hard feelings* by the phone company and by the people with Mrs. Devers, that *the jury is going to get this case come no matter what. I'm just going to let the jury determine it. I am not going to do it. But if I had to determine it, I would throw it out in a minute.*"
10. "The defense is that all *this is a family thing, and I think it makes sense,* and the jury that acquitted this man heard the same evidence, they heard the same story, with further explanation here, that they heard in the other case where the man was acquitted and it is just all tied in. But if this is the usual perjury case, I don't know, *I would like to see a more serious thing than this brought to trial on a question of perjury.* Now if you have got him for other things that is not within my purview but I would have to say that to me it appears this family thing is what has caused all this."

11. Statement at the motion for new trial: "To be perfectly fair with the defendant, I would say that *if I had been on the jury I would have decided it just the other way. I would have decided the defendants were not guilty.* And I think it is fair to the defendants for the court to bring this in whereas normally I would not do this." [This *establishes the fact that the court did not change its mind after the verdict with respect to the disgraceful nature of this case.*]

12. Opinion by the court at the sentencing—"We remember the facts of the case very well and set in on the original trial when the jury found you not guilty, and the *court felt at that time* the jury came in with this verdict, and *still feels, that there was a question of dates involved here, somebody got mixed up, with the responsible people that you had as witnesses to corroborate what you had done on the date that you had done it,* and had the state's evidence opposed to that from the phone company, and, apparently this is the reason the jury convicted you."

It would be hard to imagine words which would more clearly describe an unjust, unfair and disgraceful prosecution and trial. These were judicial determinations and opinions of the court stated during and following the trial of this case.

The question arises, "Can the determinations and word of an experienced trial judge be relied upon?" The Maryland Court of Appeals in *State v. Hutchinson,* 271 A.2d 641, stated, in effect, that the trial judge can be taken at his word. The court said that we cannot choose to ignore "the professional expertise, experience and judicial temperament with which our legal system has inherently invested a trial judge vis a vis, a jury comprised of laymen." The court further said,

> "It is true that judges, being flesh and blood, are subject to the same emotions and human frailties as

> affect other members of the specie; however, by his legal training, traditional approach to problems, and the very state of the art of his profession, he must early learn to perceive, distinguish and interpret the nuances of the law which are its 'warp and woof'."

It is apparent, then, that we are to accept the trained expertise of the trial judge in the instant case. Therefore, we may accept the foregoing statements as judicial determinations and rely upon them in determining whether the instant trial was fair and just. Indeed, the learned judge declared that it was an "absolute disgrace" and should never have gone to trial. He further described the prosecution in saying "I just think it is wrong" and declared that he "would throw it out in a minute if he had a chance."

However, the court, being fully aware that a manifest injustice had been done by the verdict, which is evidenced by his statements after the verdict was given, failed and refused to exercise the authority given to him under Rule 759 to grant a new trial "*if required in the interest of justice.*" This was a clearly an abuse of discretion if the judge's prior determinations and findings can be relied upon. The failure of the judge to act under these circumstances, and in the face of a *manifest injustice*, has the effect of discarding completely the "safety valve" as to improper verdicts which is established by the rule as to new trials and which is a *raison d'etre* in giving trial courts discretionary power as to the granting of a new trial. The court here clearly did not consider the miscarriage of justice, evidence by its own words, in determining the motion before the court. This was as much an abuse of its discretion as the refusal to consider newly discovered evidence. Nor could the court properly slough its responsibility to determine whether or not the case should go to the jury because it had sat in other cases, apparently involving petitioners, or because of "hard feelings" on the part of the parties involved.

The petitioners were denied due process of the law because of the *abdication* of the trial court from its respon-

sibilities to correct a manifest injustice. The trial judge having announced his decision to let the jury do as they may "no matter what," thus effectively removed the "safety valve" which is necessary in any fair trial to prevent a miscarriage of justice. For the trial judge to set forth the gross and manifest injustice of the trial and then *fail to act* under the appropriate statute to set aside the injustice, is a gross abuse of discretion, a denial of a fair trial and due process to the petitioners herein.

The principles of due process required by the 14th Amendment of the Constitution of the United States as set forth earlier in this brief require that the trial "ensure fundamental fairness"; that the actions of the court be not "arbitrary or unreasonable"; that "equal and impartial justice be accorded; that "fundamental principles of justice shall not be violated." As the court said in *Rochin v. People of California, supra, "Convictions cannot be brought about by methods that offend the sense of justice."* It is clear that the actions of the trial court in the instant case were unfair, unreasonable, arbitrary, partial, violating the fundamental principles of justice and brought about a conviction by methods that offend a sense of justice.

Although the general rule is that the granting of a new trial lies within the sound discretion of the trial court and is not reviewable by the appellate courts, appellate review lies when judicial discretion has been abused. A judge does not properly have such a free hand in discretionary matters. The discretion allowable is not an *arbitrary*, absolute one, but a *reasonable* judicial discretion which must be exercised within legal guidelines and in accordance with the principles of law. Clearly in denying the petitioners a new trial, under the unusual circumstances of this case, the court went beyond the confines of its proper discretionary latitude.

IN SUMMARY, it is petitioners' contend that the following circumstances surrounding the denial of the petitioners'

motion for a judgment of acquittal and for a new trial on grounds of insufficiency of evidence and to correct a manifest injustice, show such denial to be a clear instance of abuse of discretion resulting in a clear error of law, a denial of due process of the law and of substantial justice:

1. The trial court's refusal to grant the judgment of acquittal after having determined the evidence to be insufficient was clearly an error of law.
2. The trial court's failure to grant the judgment of acquittal despite the requisite insufficiency of evidence, due to (a) a personal confidence in a jury verdict of acquittal and (b) the fact that he had set on prior case of petitioners, was clearly an error of law.
3. The trial court's denial of a new trial on the basis of insufficiency of the evidence was an unjustified and unreasonable endorsement of prior error in an arbitrary exercise of discretionary powers resulting in a substantial injustice.
4. The trial court's denial of a new trial on the basis of a clear and manifest injustice created by the jury verdict. The failure of the court to grant a new trial in the interest of justice was an abuse of discretion and a denial of due process of the law to the petitioners.

The fundamental right to trial by an impartial court is rendered meaningless and unavailing if the trial judge is allowed to abdicate and withdraw himself from his rightful role as a guardian against a miscarriage of justice by a jury.

VIII. CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR DALE LEACH
916 Northwest Drive
Silver Spring, Maryland 20901
593-7401

Attorney for Petitioners

APPENDIX A
STATEMENTS AND FINDINGS OF TRIAL RECORD

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[395] (Whereupon, at the conclusion of the defendants' case, the following proceedings were had in chambers:)

THE COURT: Gentlemen, it may not be as comfortable, but I think you ought to close that door. We are on the record, but I don't think we ought to be—

All right, gentlemen, let the record show that the State has requested this conference in chambers, out of the presence of the jury, and the Court has insisted the court reporter be present.

All right, sir, what is your problem, Mr. Fannon? —

MR. FANNON: Your Honor, at this time I guess maybe I better turn it over to Mr. Femia, who has been doing some work while I have been in trial. The proffer we will make will be based upon certain evidence that came to the light of myself last night between the hours of 10:30 p.m. and 12:30 a.m. this morning, and as a result of this the State has determined there is a witness who will categorically deny certain statements introduced as facts by the defense in this case, and that this witness is out of state, and we will find it extremely difficult to get this person here this evening, and would make every effort to get this person here on Monday, and—

THE COURT: Well, we had earlier indicated that we were going to do everything we can to conclude the testimony today, and we still are of that mind, and the fact that some [396] other thought has come to the mind of the State now, I think is just a little bit too late.

MR. FANNON: This is not a thought, Your Honor. This is based on testimony and information that was adduced as a result of testimony of the defendants' witnesses late yesterday afternoon, which we possibly could not have known unless it came out on the witness stand, and when it came out—

THE COURT: It came out on the witness stand late yesterday afternoon?

MR. FANNON: That is correct.

THE COURT: Why haven't you got them here today?

MR. FANNON: Well, Your Honor, they are out of state, and we have been endeavoring to get ahold of this person and to get the person here and we just have not been able to do it, and we proffer–

THE COURT: My view of it is it is just too late and we are not going to–we are not in Japan, we are in America. I don't know if you are familiar with the way they try cases in Japan. They keep them and they wring them out and wring them out. I had a client over there who was about ready to get on a plane and come to this country, and he was held as a material witness in a murder case, and he was kept in Japan for three weeks to a month, maybe over that, and the state would recess, that is go out and investigate, wring it dry, try some more, recess, and keep going down until it [397] was–that isn't our system. This man is entitled to a speedy trial. We have tried to conclude. We hoped we could do it in one day. It has taken two days. I had indicated earlier today, before this matter was brought to my attention, and I will on the record say that you had mentioned there was a possibility of something coming up later, but I had indicated to you then I fully intended to conclude the evidence today, which I still plan on doing.

Now, Mr. Fannon, let me say this, if this were the world's worst murder case, if this was a seriously involved case, if it were not for the fact that I sat on these other cases and had thrown the other three out–there are certain indications that have come into this trial which indicates they weren't fully and completely resolved, which they were. Now, I am just trying to say that that is the fact. Here you have got a family squabble in here and this case should never have gone to trial. If it weren't for the fact I sat on those other cases, and if it weren't for my confidence the jury is going to acquit this man, I would give him a judgment of acquittal like that, and there isn't a court attendant that

doesn't feel the same way about it. I don't know what has got in your craw, but I think this is one good reason why everybody is going to go out of office, really I do. I think this case is a disgrace. And I will say this to every one of you, it is an absolute disgrace.

[398] MR. KENKEL: If Your Honor please, may I tell you what is behind the case on the record?

MR. FANNON: I think we are on the record.

THE COURT: We are going to go right into it, gentlemen. I know what you think is behind it. These men are charged with this one thing, and not for some other things that you think might be going on, or other matters that have come to my attention out of the evidence as appeared in this trial. But I can't be concerned about that, how somebody manages to revolve these things around. We are confronted with a rather narrow issue, a very narrow issue in this case, not what is involved in the other cases. And to think the Grand Jury even considered these other two cases that this man is charged with is utterly fantastic, when title to the car and truck were in the wife's name. And you all are thinking of having him indicted for larceny, or whatever these pending cases are. If you come out with that, that will be just another proof to me you are going after—beating a dead horse.

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[401] THE COURT: But the jury could feel that the wife and the State have got the date just as wrong as the other side has.

MR. FANNON: But the telephone company records show that is not the case. His testimony in the first trial is enough to show that wasn't the case.

He said, "I didn't work that day. I worked Thanksgiving and didn't work the next day." And they were his exact words.

MR. LEACH: He said he was off.

THE COURT: Here you have got a situation, you have got a wife fighting a husband. So, we are going to dig a

hole, and then we are going to go out and we are going to get a mother and a son and we are going to put them in that same hole. We are going to cover it up and tell you all to go [402] home and forget the whole thing. Now, that is just about what ought to be done. Now, what you are doing now is starting another family fight. The son comes down here and says that he remembered this and he remembered the dates. Now you want to bring in the mother to show that the son is a liar. They you will be indicting him for perjury.

* * * * *

MR. LEACH: Your Honor, this is all this is, a family squabble, but it is being taken up by the State's Attorney's Office. They got some illusion in their mind that some great conspiracy of some kind is going on here, which does not exist.

* * * * *

[405] MR. FEMIA: This is not the ordinary perjury case.

THE COURT: It sure isn't, because I don't know why it was in here in the first place, and I don't know who instigated it, but it is certainly not the usual perjury case. A man comes in and explains, right or wrong, but by using his explanation he makes an honest recollection. Now, I don't think there is anything here but implication. There is no direct evidence that the man is lying. It is true you have got records from the company, but it is easily explained, as I see it, and I just think it is wrong.

MR. FEMIA: Well, Judge, it is not our policy, as you know, we feel much like the Court, that in just about every criminal case somebody is not telling the truth, and the jury so finds every time a verdict is rendered one way or the other; but in this particular case we are not concerned with the man reiterating a set of facts that could have occurred one way or another. What disturbs us is obviously the events that are alleged to have occurred on [406] November 28 are not only manufactured, but they are

reiterated by two other witnesses, one of whom is shown by the records to have been working that date. It is the manufactured lie we are concerned with, not the possibility–

THE COURT: Yes, and against what you say, Mr. Femia–and you weren't in the court when the testimony was given, but I assume you know what the witness has said even if you weren't there, and I am just smiling when I say that–but when an old lady gets on there, and old lady, Mrs.–

MR. FANNON: Harden, the mother of the witness.

THE COURT: No. No. No. The old lady that comes in with a reputation of a Seventh Day Adventist, and they don't even use lipstick, maybe they do a few other things, I don't know, but she is over in Montgomery County, she is in charge of an agency that lists registered nurses and practical nurses and other nurses, but the main business they do is practical nurses, she comes in with a white uniform, she has got her right hand all bandaged up, and if there is any juror in the world who would disbelieve her I just would like to see it. And this other lady that came in and remembered her son's birthday, and testified that it was on that day. Gentlemen, I just don't think that this evidence–I don't see how anybody can turn it.

MR. KENKEL: Your Honor, arguing the disputed evidence, that will be Jim's job, but we want the Court to [407] understand what is behind it. It is not a family feud. We are not in the business of running a Hatfield and McCoy–

MR. LEACH: What is behind it? I would like to know.

THE COURT: I am trying to find out, too, because now I have heard all these innuendoes, but I haven't heard them in court. I will say that to Mr. Fannon, I have not heard them from him.

MR. LEACH: I would like to have it on the record here what the real issue is.

THE COURT: Somebody says out of the courtroom–the rumors that go all over the courthouse about what is going on here, and about some other criminal case that was involved, but I must say we are here to try this one case. And I will tell you if I hadn't sat in those others–and the people involved on the other side, there are such hard feel-

ings by the phone company and by the people with Mrs. Devers, that the jury is going to get this case come no matter what. I am just going to let the jury determine it. I am not going to do it. But if I had to determine it I would throw it out in a minute.

MR. FEMIA: That is interesting that you should mention the phone company in the same breath.

THE COURT: Well, I mention the phone company because they are obviously interested. Their employees are still here. [408] The man has been fired. The investigation is there. Obviously the phone company is interested.

MR. LEACH: They are listed as the witnesses for the State in there.

THE COURT: They have got to be interested and I am sure they are interested.

MR. LEACH: And two-thirds of the witnesses are the phone company's.

MR. FEMIA: We are all interested from top to bottom.

THE COURT: And the defense wanted to bring up the fact the phone company was vindictive and I wouldn't let them bring that in.

MR. KENKEL: I think that is as improper as an innuendo coming from us.

THE COURT: I have been lenient to the other side because this is the defense. The defense is that all this is is a family thing, and I think it makes sense. And the jury that acquitted this man heard the same evidence, they heard the same story, with further explanation here, that they heard in the other case where the man was acquitted, and it is just all tied in.

But if this is the usual perjury case, I don't know, I would like to see a more serious thing than this brought to trial on a question of perjury. Now, if you have [409] got him for other things that is not within my purview, but I would have to say that to me it appears this family thing is what has caused all this.

I remember when Mr. Anderson testified at the last trial, and I remember how inconsistent he was and how silly his

testimony seemed to me to be. It was almost childish, the fact that neighbors were interfering with family problems.

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[418] THE COURT: We are going to allow it as long as you don't go too far afield. All you have done so far is repeat exactly what you did on direct examination, only you [419] have got one more witness, which is certainly not proper rebuttal.

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[444] PROCEEDINGS

THE COURT: Very well, gentlemen, the Court will hear from you.

MR. LEACH: May it please the Court, this morning, Your Honor, we have made a motion for a new trial based upon the insufficiency of the evidence to support the jury's verdict and along with that it is incumbent upon us, I would feel, to also claim that the Court erred in failing to grant a directed verdict at the end of all the evidence. So as a matter of form we would make this motion.

The verdict that was handed down, our contention is that it was not in any way supported by the evidence presented by the State in this case, not evey by a preponderance of the evidence did they prove their case, much less beyond a reasonable doubt. It is our contention that the evidence that was presented in this case no reasonable man could arrive at this verdict. We believe the verdict was almost unbelievable in the face of the evidence that the jury heard. It is shocking to endeavor to figure out how in the world they ever arrived at such a verdict if it was on the basis, which it had to be, of the evidence presented in this court before Your Honor.

Now, as we study the law, we would feel that the Court has, according to the law of this state, the right to order a new trial. I refer to *Johnson v. State*, 1959:

> "The insufficiency of the evidence to sustain [445] a conviction gives grounds for a new trial and where the verdict of the jury is against the law in the

opinion of the trial court, the court can remedy the error by granting a new trial."

Again in *Slansky v. State*, 1949, and *Wyley v. Warden*, 1967—and I will be glad to give these references if the Court would like to have them read—the Court said:

> "The remedy for any mistake or error by jurors in exercising their power of determining the law and the facts or for the abuse of it is by an application for a new trial. Where the verdict of the jury is against the law in the opinion of the trial court, the court can remedy the error by granting a new trial."

Again, *Wyley v. Warden*, referring to the Constitution, it says:

> "Under the Maryland Constitutional provision that in all criminal trials the jury shall be the judge of the law as well as the facts, if the trial court is of the opinion that the verdict is against the law it may set aside the verdict and grant a new trial."

Again in *Rees v. United States:*

> "The trial judge is under a duty to pass upon the verdict of the jury and the sufficiency of the [446] evidence to support the verdict."

Again *Quesenbury v. State*, a 1944 case:

> "Whether the State has established by proof beyond a reasonable doubt of facts material to the defendant's guilt of the crime charged is a matter addressed solely to the trial court's discretion on motion for new trial following the jury's determination."

We feel that these holdings of the Court of Appeals do give this court the right to order a new trial in this case.

We would refer the court to the memorandum of law that was filed this morning and given to the State's Attorney in this matter.

The burden being upon the State to prove beyond a reasonable doubt every element of the offenses that were

charged in this case is beyond question. These two men were charged with two different crimes. Mr. Webster was charged with perjury; Mr. Devers was not. He was charged with subornation of perjury. We find that in perjury the elements are the willful making, when under oath in a judicial proceeding or court of justice, or a false statement material to the issue or point of inquiry. And there must be a specific intent to falsify or deceive, as *Brown v. State* indicates. A crucial part of the State's case against the [447] defendant Webster was their attempt to show that Webster didn't make the trip to West Virginia. They said he lied in two respects: No. 1, he said he went to West Virginia that day, and they say that in another respect he lied in stating that he thought he worked on Thanksgiving, the day before.

Now, the evidence that the State presented, taking Mr. Webster, they said he did not make the trip to West Virginia because he was at work, and yet they did not present one witness that saw this man in this area during the time he said he was in West Virginia. Mrs. Devers and Mrs. Anderson, neither one said that they saw Mr. Webster in this area during his crucial period. Those were two of their witnesses. They had four other witnesses from the telephone company, all of them to a man, said they didn't know whether he was there or not of their own personal knowledge. All they did was consult their records and it showed he worked eight hours. They didn't know what eight hours. True, he had a shift from four to twelve, but they didn't know whether he worked that full day from beginning to end. And when they were asked the question on cross-examination, "Isn't it possible the man could have gone to West Virginia, came in late on the shift and worked eight hours and you would never have known it and your records wouldn't have shown it?" And they [448] said, "Yes."

So every witness—the two ladies didn't see this man in this area so they cannot say he was not in West Virginia. The four telephone company employees, not one of their testimonies indicated that he was not in West Virginia. In

fact, they have to admit that he could have gone to West Virginia and come back and worked and their records would have never shown the difference. So the testimony of the four telephone company people could be used to show the man's innocence as well as his guilt.

The law says, and this was a part of the instructions to the jury on circumstantial evidence under Instruction No. 4 to the jury:

> "Where the State undertakes to prove the guilt of the defendant by circumstantial evidence"—which is all these records are—"it must not only prove the circumstances relied upon, but it must overcome the presumption of innocence of the defendant and establish his guilt beyond a reasonable doubt. All necessary circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a prob-
>
> exclude is used—"they must exclude every [449] reasonable hypothesis except that of guilt."

The testimony of the telephone company employees, the records themselves do not exclude innocence, and out of their own mouth they say it could be that he was innocent, he could have been there and gotten there late. And this is the State's case. All four of their telephone company witnesses had to admit this, he could have been there, late, as he said.

This leads us to the conclusion that the State has not produced one witness that this man lied about where he was on November 29th, in an airplane flying to West Virginia and back, leaving at 12:30 and getting back about 8:30 and going in to work at 10:30 and working until approximately 6:30 the next morning. Not one witness did the State present to show that that was not true. It stands as unrefuted. The jury didn't have a choice to say, "Well, here is a man that says he was there and he says he wasn't there." They didn't have to make that choice,

because they couldn't produce one man that said he was here.

How can you convict a man of perjury when he says he went to West Virginia and he proves that he did, and the State can't produce one witness that he didn't? The jury had to be out of their minds to come back with a verdict against the man when they had not one single witness to tie it to except the circumstances. The circumstances, according [450] to the law, must exclude any reasonable hypothesis of innocence. The State's own witnesses had to agree that the hypothesis of innocence was there in their testimony and in their records, so he did work eight hours, but they were just a little different. So he did not lie. What he told this Court in February about making this trip was true.

How do we know? Besides Mr. Devers and Mr. Webster we have four unrefuted, unimpeached witnesses. We have a Mr. Steven Ellis who said he saw them take off in the plane, Mr. Devers, Mr. Webster and Mr. Harden, take off at about 12:30 for West Virginia. We have the testimony of Mr. Harden who went with them who says yes, they made the journey to look at land. He sees them taking off from the West Virginia airport at approximately seven p.m. Unimpeached testimony, both of them unrefuted. And at 8:30 p.m. we had two witnesses produced, a woman, Mrs. Lois Zagri, who operates a nursing registry, who states that she was with the housekeeper, and had an appointment to see Mr. Devers about the care of Mrs. Gillespie, that she was at Hyde Field and saw this small plane land and Mr. Devers and Mr. Webster get out of that plane at approximately 8:30 that evening.

Another witness, Vivian Springman, who works for that registry and is a practical nurse, was present and saw Mr. Devers and Mr. Webster get out of that plane at 8:30 that night.

[451] The State did not produce one witness to impeach and to show that they were not telling the truth. There was not one witness in this case of the defense that was

found lying to this Court or giving a misstatement or was impeached in any way.

And yet Mrs. Devers, their main key witness, was impeached and proven a liar right before the Court. She said that Trooper Smith told her she could break into the house, throw a brick through the window. We bought in Trooper Smith and he said this woman lied to him, this wasn't true, he never told her to do this. He said she lied to him then too. She said she lived there and that she had been run out and he found out later she didn't live there and left voluntarily, proving her a liar. She never got back onto the stand to explain that. Why? Because it was the truth.

Another time she lied and was impeached right in court was when she said that Mr. Devers, she had filed the grand larceny, testified against him bringing grand larceny charges against him for stealing his own car and she testified it was his own car twice in court and then turned around and files these charges against him. But she said, "I bought the truck back with my own money." And so a witness comes in and this witness testified, Frank Dillon, that he saw Mr. Devers give the money to Mrs. Devers to pay for it. She never gets back on the stand to deny this. Again it [452] is the truth. This woman was shown to be a liar again and again during this testimony.

The inconsistencies of her story and the story of Mrs. Anderson, they conflict with each other. Mrs. Devers is the only one that states that she saw somebody. She says she saw her husband about six o'clock that evening. She says she was going by Lyle's Steak House on a bright, sunny day. The observatory said it got dark at 4:54 that day. And at six o'clock she is having a bright sunny day seeing him standing out in front of this place lying.

She says he tried to run her off the road about a half hour before the first phone call at 7:30. Mrs. Anderson says in her testimony she got home and Mrs. Devers was home at that time. An hour and a half before the first call was at six o'clock. So they are lying and they are for-

getting to get their stories together. And these are the main witnesses they produced.

There is not one single, solitary witness—and I challenge the State to show us here today who that witness was—that proved that Mr. Webster did not make that trip to West Virginia and go in late to work. There is not one. Even his own circumstantial witnesses have to verify that he could have done just what he did do. And there is no evidence that he did not do what he said he did before this Court. He told the truth and there is no proof that he didn't, [453] absolutely none, not a conflict. There just isn't any at all.

Now, what about Thanksgiving, the day before? Mr. Webster said, "I made a mistake." He was trying to recall in February off the top of his head whether he worked on Thanksgiving. He said he had changed shifts and he thought he did. He readily admitted he had made a mistake. This could happen to anyone.

According to the law a mistake of fact or inadvertence, something made inadvertently, is not perjury. If so we would all be guilty of perjury. He didn't have time to check the facts. And you remember when we asked the telephone company people they said they couldn't remember anything unless they brought out all these records they introduced in evidence. That is the only way they could remember whether he worked or not. If we could ask them off of the top of their heads they might have made a mistake as Mr. Webster made a mistake.

But the State brings in all the evidence to show that the telephone company people have to have all these records before they can tell and yet they want to send this man to prison because he made a mistake, because he didn't have access to those records.

Even that mistake is irrelevant, and in that trial in February it was irrelevant what happened the day before [454] on Thanksgiving. One of the tests for perjury is that it must be relevant to the case. It wouldn't have affected that trial one iota whether he worked or did not work on Thanksgiving. Not one iota. So it is *immaterial.*

The only issue was did he make those phone calls on November 29, and the jury said he didn't. They say he was lying because he was on this trip. So the Thanksgiving statement was a mistake, pure and simple. There was no evil intent even shown by any of these people, by any of the witnesses. So this takes care of the perjury. There is not one scintilla, not one iota of contradictory evidence to the statement Mr. Webster gave to this Court of making a trip to West Virginia, but all kinds of supporting evidence of disinterested parties was unimpeached.

Mr. Devers was charged with subornation of perjury. He wasn't charged with perjuring himself at all. He was charged with securing Mr. Webster to tell a lie in court. Now, the law says in order to prove that, there has to be perjury, of course, but in addition to that, the State must show three things: that Mr. Devers procured and instigated another to commit the crime of perjury; second, and it is essential to the offense that the suborner, Mr. Devers, should have known or believed or had good reason to believe that the testimony given would be false, that he should have known or believed that the witness would testify willfully [455] and corruptly and with knowledge of falsity and that he should have knowingly and willfully induced or procured the witness to give such false testimony, and a reference is given in my memorandum. I challenge the State to show one witness that they produced, or any of the testimony in this case that shows Mr. Devers ever asked Mr. Webster to come and testify. The evidence was that I subpoenaed Mr. Webster to come. The evidence was that Mr. Webster came forth and volunteered to testify as to what had taken place on November 29th. There is not one scintilla of evidence that Mr. Devers ever asked Mr. Webster to come in that court and do anything, not a bit. The only thing that can be said is that Mr. Devers simply testified himself and Mr. Webster came voluntarily and was subpoenaed by the attorney. There is no evidence that Mr. Devers asked Mr. Webster to come in and tell something

that was not true. That has to be shown, that he asked that was not true. That has to be shown, that he asked him to come, that he asked him to tell a lie and that he knew it was a lie. None of that has been proved, not one scintilla of evidence, not one witness to say, "Yes, I heard him say, 'Cone on in and tell a lie for me.'" Not one witness, not even a circumstantial witness here. Their only circumstnace would be or could be that he was subpoenaed and the attorney asked him to come and testify. The testimony is that he voluntarily agreed to come. There is no evidence of any soliciting of false testimony by Mr. Devers. [456] How in the world the jury could make him a suborner of perjury with not one single witness, not one single statement that he had asked this man to come in—but the only evidence they had is that he volunteered, that he was subpoenaed, and that Mr. Devers did not call him to come and did not talk to him about what he should say, much less ask him to come in and testify falsely. I have never in all my life been so shocked and dumbfounded as when, on the basis of this evidence of the State, the unimpeachable defense, a jury brings back a guilty verdict that wouldn't in a simple case, have even made the grade as 51 per cent, much less beyond a reasonable doubt. There is no witness to subornation, there is no witness that they did not make this trip. There are all kinds of witnesses that they did and they are unimpeached.

It is very clear from the evidence in the case that Mrs. Devers has been on a vendetta against her husband in order to get a good property settlement. She did not deny that. And so she continues to bring these actions against her husband, trying to put him in prison, in some position where he will give her more property. This is not a proper function of the State's Attorney's office, to file domestic matters as criminal in order to help out a wife against her husband.

Now they are going to say Mr. Webster said he was off for the day. He testified that he was off from his [457] regular schedule, which he was. If he had said anything else he would have been lying. He explained this. I think that the Court has to take under consideration the evidence

that was here, the competency or credibility of the witnesses. I think the trip has been verified that it was as true occurrence that took place. The State's own witnesses must admit that.

The State's witnesses, Mrs. Anderson and Mrs. Devers, have lied again and again to this Court and they were caught in some of their lies. The fact that they couldn't remember the time about Thanksgiving is irrelevant. We even had documentation, the pilot's log. We had the nurse's notes that she had made from the time of this occurrence. I think this whole thing arises out of a domestic case, two phone calls. The same women filed those cases that were instigating this case. The whole thing is domestic from beginning to end, and why the State's Attorney's office chooses to push these things as if these men were criminals, and not even produce a case and then have the jury come back with a verdict like this is the greatest miscarriage of justice that one could imagine. The State's Attorney's office, we believe, should have thrown this case out. They have not proven a case in any way, shape or form and I don't believe any court in the country, any judge, would say that they did. It simply was not there, as a matter of law there [458] was no sufficiency of evidence.

There was also pointed out in this case that there had been so much harassment of these men and now this man has been driven almost to the point of a nervous breakdown by this unjust, unsupported conviction. The State must prove beyond a reasonable doubt and they simply didn't do it. He made the trip and they did not prove that he didn't, not one witness. Circumstantial evidence they presented, and their witnesses said, "Yes, it could have been just like he said." There is no evidence of Mr. Devers asking anyone to deny or even asking him to come and testify. I think, Your Honor, to permit this verdict of the jury—it is unbelievable that they could arrive at a verdict such as this from this evidence. It had to be arrived at from something else in their minds. Who knows? I think to permit this guilty verdict to stand would be one of the greatest miscarriages

of justice this Court has ever seen. To send these men to prison on a serious offense up to ten years, when they came in and told this Court the truth, and these two women lying, they come in and lie right in our teeth here, and stand back and rejoice—because you see they are after the property. The State's Attorney's office is their tool. Mr. Fannon has represented Mrs. Devers in all of her cases. I believe that to permit this to stand would be a travesty on justice, it would be a miscarriage of justice, and I believe justice [459] would be turned way backward and truth would be cast to the street and innocent people would be punished.

And I think two other things: I think if the Court upholds this outlandish, ridiculous, unbelievable verdict, permits it to stand, this will do nothing but encourage the State's Attorney to do more of the same, to encourage their office to continue these types of vendettas against people, getting themselves involved in domestic criminal cases, taking up for one side or the other. I think also if this verdict is permitted to stand it will encourage these two women to go boldly on and file more phoney charges against more and more people, and if they can do it, why can't their friends do it and why can't everybody in the country do this when they have got it in for somebody?

I think to permit this would bring dishonor and disrespect upon this court. I think this case in itself was an outrage. The State has not proved its case, they have not found these men in one lie, but only a mistake as to Thanksgiving. We would ask that the Court grant a new trial.

I think of what Mr. Fannon said in his closing argument. He said perjury is a crime against justice. Your Honor, I submit that to permit this unsupported verdict to stand would itself be a crime against justice. I believe today that justice itself is at stake and respect of the court and whether more of the same of this sort of thing is [460] going to happen. I believe that from what I have heard in this case and in other cases in the testimony that the State has charged the wrong people. These women have lied to this court again and again, and yet they have never been charged. The State's Attorney's office protects them.

Your Honor, we would respectfully request the court, on the basis of the insufficiency of the evidence, the failure of the State to make a case beyond a reasonable doubt, that any reasonable man could say was beyond a reasonable doubt, to set aside this miscarriage of justice that for some reason or another has come from the jury. Thank you, Your Honor.

* * * * *

[468] MR. LEACH: Your Honor, I would simply point out by way of rebuttal that this perjury was not made, the charge was not made upon the testimony of phone calls. In evidence is the indictment which only sets forth a plane trip stated by Mr. Webster. It was specifically stated we were not trying the February case as to whether the phone calls were made. He was found not guilty But there was a question, they state, as to whether this trip was made. That was the testimony which is in the exhibit, or the indictment that they went to trial on, and they cannot change and expand it now.

Devers was not charged with perjury. I think the cases that the State has referred to that they don't have to prove beyond a reasonable doubt, we would agree to. But they had virtually no proof at all, only circumstantial which could be adduced to prove innocence as well as guilt. This was no farfetched fairy tale, as referred to in one of the cases, this was simple hard facts of unimpeached witnesses [469] that they saw them at these crucial times. The telephone company people by their own testimony stated that the defendant's statement, Mr. Webster, could have been true, according to their records. I think the credibility is for the Court to weigh as well as the jury in matters such as this.

I think in subornation, they have to show that he solicited false testimony. There was no evidence that Mr. Devers was the one who asked or sought Mr. Webster's testimony. The only evidence was that it was voluntary, that he was subpoenaed by counsel.

Thank you, Your Honor.

THE COURT: First of all, the defendants have brought their motion on three grounds, which, under the rules, they must state: First the weight and sufficiency of the evidence. We conclude that the weight and sufficiency of the evidence is for the jury to decide and not for the Court. Once the case goes to the jury, assuming that it properly is presented to the jury on a question of fact, then the weight and sufficiency of the evidence is totally for the jury and not for the Court. It is the responsibility, of course, of the Court to determine, on a motion for judgment of acquittal at the end of the State's case and at the end of the entire case, as to whether there is sufficient evidence to present a question of fact of guilt or innocence [470] to the jury. We concluded, on the basis of the State's theory of the case, that they had presented sufficient to go to the jury and for the jury to consider it. Once this was done, of course, the weight and sufficiency was up to the jury.

The question that has been raised about the overtones of domestic strife was clearly brought out in the evidence presented by the defense before the jury and they had the benefit of all the defense that the defendants put up, so this was considered by the jury and not considered as sufficient defense to the fact of whether or not this trip was made at the particular time. Apparently the crux of the case was the trip may have been made but must have been made at some other date. It is true that the witnesses presented by the defendants indicated that the trip was made on that particular day and at the particular times indicated by the witnesses. But the jury had a right to consider the testimony from the people from the telephone company as to whether Mr. Webster was at work or not, and they had a right to weigh this evidence along with all of the evidence submitted, the additional evidence submitted by the State, the statements of Mrs. Devers as well as the witnesses presented by the State.

Now, they give as their third reason that it was shocking to the conscience of the Court. Well, if the verdict of the jury was shocking to the conscience of the [471] Court, I

don't know how the defendant can read the thoughts of the Court, but they have a right to allege anything they want. We have got to remember that on a motion for new trial we cannot go into the jury room and find out what they discussed when they arrived at their verdict. So we would assume they discussed the evidence pro and con according to the theory of the State and the theory of the defense. We cannot substitute, the Court cannot substitute its opinion for that of the jury. The Court might disagree with the verdict, but it is up to the jury to determine the case and not up to the Court. If the State makes out a prima facie case, circumstantial evidence or not, they are entitled to have the jury decide it. And of course the credibility of the witnesses is for the jury to determine, not the Court. Once the Court has originally determined that they are proper witnesses to testify, then, of course, what they say and how the jury is going to view it and what weight the jury gives it is up to the jury.

We think that under the circumstances it is not necessary for the Court to comment any further on this. It is discretionary with the Court as to whether we would grant a new trial or not. We think the case was fairly presented to the jury and we think that the defendant presented, each defendant presented many witnesses in behalf of their theory of the case. The jury weighed this evidence and decided that [472] there was no reasonable doubt, and the question as to whether there was reasonable doubt or not was entirely within the province of the jury and not within the province of the Court.

To be perfectly fair with the defendant, I would say that if I had been on the jury I would have decided it just the other way. I would have decided the defendants were not guilty. And I think it is fair to the defendants for the Court to bring this in whereas normally I would not do this, and normally the Court would not express any opinion as to whether they agreed or disagreed with the verdict of the jury. The point, however, has been raised in this motion for new trial, and again we come to that admonition that

the Court must not substitute its opinion for that of the jury on questions of fact. We think that the State did present sufficient evidence to allow it to go to the jury, and it went to the jury and the jury decided it that way. The fact that the Court might have decided it some other way really is not allowable as a reason for granting of a new trial because we feel that once the case went to the jury to decide it was up to the jury to decide it either way. They decided that the defendants were guilty and we feel that the verdict must stand and for these reasons we deny the motion for new trial in each of the two cases.

* * * * *

[477] The Court knows, as well as your counsel knows, of the undertones in these cases, but we are not here concerned with the undertones in the cases. And because of these undertones the State would have the Court incarcerate you and your co-defendant on the other charge. But the Court feels that in fairness to you we have to view this matter as we see it and not because of some implications that were made on the record in chambers during a break in the trial, [478] or some statement that the State's Attorney has now made that the matter was instigated at the request of the Attorney General.

We remember the facts of the case very well, and sat in on the original trial when the jury found you not guilty. And the Court felt at the time the jury came in with this verdict, and still feels, that there was a question of dates involved here, somebody got mixed up, with the responsible people that you had as witnesses to corroborate what you had done on the date that you had done it, and had the State's evidence opposed to that from the phone company, and, apparently, this is the reason the jury convicted you. However, you do stand convicted, and the Court feels that under the circumstances you must have some control by the authorities.

* * * * *

APPENDIX B

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

September Term, 1969

[Caption omitted in printing]

Murphy, C.J.
Anderson
Morton
Orth
Thompson,
JJ.

Opinion by Orth, J.

Filed: April 14, 1970

Raymond George Devers and Bryan D. Webster were jointly tried before a jury in the Circuit Court for Prince George's County. Devers was found guilty of subornation of perjury and Webster of perjury. We reverse each judgment because of error with respect to the denial of motions for judgment of acquittal.

When a motion for judgment of acquittal is made in a jury case it is the function of the lower court to determine whether or not the evidence before it is sufficient in law to sustain a conviction. If it determines that it is, it should deny the motion and submit the case to the jury; if it determines that it is not, it should grant the motion and the case does not reach the jury. It is the function of this Court when the question is properly before it, to determine whether the lower court erred in denying a motion for judgment of acquittal. The test to be applied is whether the evidence shows directly or supports a rational inference of the facts to be proved, from which the jury could fairly

be convinced, beyond a reasonable doubt, of the defendant's guilt of the offense charged. If there was such evidence there would be no error in denial of the motion; if there was no such evidence, denial of the motion would be reversible error. See *Williams v. State*, 5 Md. App. 450, 452-460.

However, the instant case does not reach us with regard to the denial of the motions for judgment of acquittal in the usual posture. We think it fundamental to the rights of a defendant that the lower court deny a motion for judgment of acquittal only on the basis that it has considered the evidence adduced, and recognizing that its weight and the credibility of the witnesses are matters for the jury, finds that the evidence in law was sufficient to sustain the conviction. We can only conclude that in the instant case the lower court's denial of the motion for judgment of acquittal made by each appellant at the close of all the evidence was influenced by other factors to the extent that the appellants were denied due process of law. Thus we must reverse the judgments and do so without reaching the question of the sufficiency of the evidence *per se*. We reach our conclusion from remarks made by the lower court. At the trial, upon the close of evidence offered by appellants, the State requested a conference in chambers concerning a witness it desired to call in rebuttal. During this conference the court said:

> "* * * Now, Mr. Fannon, [Assistant State's Attorney] let me say this, if this were the world's worst murder case, if this was a seriously involved case, if it were not for the fact that I sat on these other cases and had thrown the other three out—there are certain indications that have come into this trial which indicates they weren't fully and completely resolved, which they were. Now, I am just trying to say that that is the fact. Here you have got a family squabble in here and this case should never have gone to trial. *If it weren't for the fact I sat on those other cases, and if it weren't for my confidence the jury is going to*

> *acquit this man, I would give him a judgment of acquittal like that,* and there isn't a court attendant that doesn't feel the same way about it. I don't know what has got in your craw, but I think this is one good reason why everybody is going to go out of office, really I do. I think this case is a disgrace. And I will say this to every one of you, it is an absolute disgrace. * * * Somebody says out of the courtroom—the rumors that go all over the courthouse about what is going on here, and about some other criminal case that was involved, but I must say we are here to try this one case. *And I will tell you if I hadn't sat in those others—and the people involved on the other side, there are such hard feelings by the phone company and by the people with Mrs. Devers, that the jury is going to get this case come no matter what. I am just going to let the jury determine it. I am not going to do it. But if I had to determine it I would throw if out in a minute."* (emphasis supplied)

When trial resumed the State called one witness in rebuttal. His testimony was in substance cumulative and the court noted that it was not appropriate rebuttal. It said: "All you [the State] have done so far is to repeat exactly what you did on direct examination, only you have got one more witness, which is certainly not proper rebuttal." This testimony closed the evidence and appellants moved for judgment of acquittal. It was denied. The court felt the evidence had "created a question of fact which the jury must resolve, as we indicated in chambers when we were on the record. We feel that this case does present a question for the jury, a question of fact to determine whether or not the defendants are guilty as charged."

We are constrained to conclude that the court denied the motions for judgment of acquittal because it was leaving the question of guilt to the jury "no matter what." That the court was confident the jury would acquit was not a proper basis for a denial of the motions. Nor could the court properly slough its responsibility to decide whether or not

the case should go to the jury because it had sat in other cases, apparently involving appellants, or because of "hard feelings" on the part of the parties involved. We think appellants were entitled to have their motions determined by the court applying the proper test and that the record affirmatively shows that the motions were not so determined. We hold that they must be awarded a new trial.

Although not necessary to our decision, we observe that the lower court erred also in the denial of a motion for a new trial because it failed to apply the proper test. In *Pinkney v. State*, 9 Md. App. 283, No. 323, September Term, 1969, filed _____ 1970 we found it clear that in this jurisdiction a convicted defendant in a criminal prosecution has the right to be heard on a motion for a new trial, properly filed by him, in the court in which the motion is pending; that the sufficiency of the evidence, within the applicable test, is a ground for a new trial; and that although the general rule is that the grant of a new trial lies within the sound discretion of the trial court and is not reviewable by this Court, appellate review will lie when judicial discretion has been abused.

Maryland Rule 759 a states simply: "The court may grant a new trial if required in the interest of justice." Appellants' motion for a new trial posed the matter of the sufficiency of the evidence. The question would ordinarily be, was the evidence adduced so insufficient that the interest of justice required a new trial? The test to be applied in resolving that question, as recognized by us in *Pinkney* is:

> "A verdict or finding of the jury must be based upon and conform to the evidence; and a verdict wholly unsupported by any evidence whatever should not be allowed to stand. But that a verdict is against the preponderance of evidence is no objection unless there is such a preponderance of proof on the other side as to show that manifest injustice has been done by the verdict, and to warrant the conclusion either that the jury have mistaken or failed to weigh the evi-

> dence properly, or to apply legal principles, or to arouse suspicion of corruption, prejudice, or partiality on the part of the jury. Whether a new trial should be granted for insufficiency of evidence rests largely in the discretion of the trial court. It has also been held that a verdict based on incompetent evidence on a material issue must be set aside."

We noted in *Pinkney* that the test as to the sufficiency of the evidence with respect to the grant of a new trial is broader in scope than the test as to the sufficiency of the evidence with respect to the grant of a motion for judgment of acquittal. For in determining a motion for judgment of acquittal the lower court does not weigh the evidence or judge the credibility of the witnesses; those matters are for the trier of fact. But in determining a motion for a new trial, the lower court must weigh the evidence and judge the credibility of the witnesses; only in so doing is it able to ascertain whether there is such a preponderance of proof in favor of the accused "as to show that manifest injustice has been done by the verdict." See *Johnson v. State*, 219 Md. 481, 483; *Brown v. State*, 237 Md. 492, 499. In denying the motion for a new trial the lower court disposed of the ground that the weight and sufficiency of the evidence did not support the conviction by asserting that the weight and sufficiency of the evidence were not for it. It said:

> "We conclude that the weight and sufficiency of the evidence is for the jury to decide and not for the Court. Once the case goes to the jury, assuming that it properly is presented to the jury on a question of fact, then the weight and sufficiency of the evidence is totally for the jury and not for the Court to determine, on a motion for judgment of acquittal at the end of the State's case and at the end of the entire case, as to whether there is sufficient evidence to present a question of fact of guilt or innocence to the jury. We concluded, on the basis of the State's theory of the case, that they had presented sufficient to go to the jury and for the jury to consider it. Once this was done, of course, the weight and sufficiency was up to the jury."

This was manifestly incorrect with respect to the grant of a new trial. It discards completely the safety valve as to improper verdicts which is established by the rule as to new trials and which is a *raison d'etre* in giving trial courts discretionary power as to the grant of a new trial. The court here clearly did not consider the weight of the evidence in determining the motion before it. This was as much an abuse of its discretion as the refusal to consider newly discovered evidence. See *Burley v. State*, 239 Md. 342, 344; *Givner v. State*, 208 Md. 1.

Appellants' brief was more than 25 pages in length without special permission of this Court. Rule 1031 b. It also contained a record extract not authorized by the Rules pertaining to this Court. Compare Rule 828. Appellants did not prosecute the appeal as indigents. The costs other than the printing of appellants' brief shall be paid by the Board of County Commissioners of Prince George's County. The costs of printing appellants' brief shall be paid by the appellants. Rule 1082.

JUDGMENT REVERSED
IN CRIMINAL TRIALS 8996;
JUDGMENT REVERSED
IN CRIMINAL TRIALS 8997;
CASES REMANDED FOR A
NEW TRIAL;
COSTS TO BE PAID AS
DESIGNATED IN THIS
OPINION.

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND
SEPTEMBER TERM, 1970

[Caption omitted in printing]

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

The Petitioner, State of Maryland, by Francis B. Burch, Attorney General, Francis X. Pugh, Assistant Attorney General, Arthur A. Marshall, Jr., State's Attorney for Prince George's County, and James E. Fannon, Jr., Assistant State's Attorney for Prince George's County, respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Special Appeals in this case.

STATEMENT OF THE CASE

Respondents, Raymond Devers and Bryan Webster, were tried in the Circuit Court for Prince George's County on August 14 and 15, 1969, the Honorable William B. Bowie presiding with a jury, and were convicted respectively of subornation of perjury and perjury. Motions for judgment of acquittal were made at the end of the State's case and were renewed at the end of the trial. These motions and the motion for a new trial were denied and each Respondent received a two year suspended sentence. Respondents filed an appeal and the Court of Special Appeals in *Devers and Webster v. State,* Md. App. , reversed and remanded the case for a new trial. Because of comments made by the trial judge, in chambers, indicating a determination that the case would be submitted to the jury, the Court of Special Appeals refused to even consider whether or not there was sufficient evidence to go to the jury.

The mandate in the case was issued by the Court of Special Appeals on May 14, 1970.

JURISDICTION

The jurisdiction of this Court is invoked under Rule 811b of the Maryland Rules of Procedure.

GROUNDS FOR ALLOWANCE OF THE WRIT

Review of the decision rendered by the Court of Special Appeals is desirable and in the public interest in that the decision conflicts with the principle, well established since adoption of the amendment to Article XV, Section 5, of the Constitution of Maryland, effective December 1, 1950, that the decision of a trial court denying a motion for judgment of acquittal will be reversed on appeal only upon a showing that the decision was clearly wrong.

ARGUMENT

Respondents' indictments arose out of testimony given by Respondent Webster at the trial of Respondent Devers on February 3, 1969, on a charge of harassing or obscene telephone calls under Article 27, Section 555A, of the Annotated Code of Maryland (1967 Replacement Volume). Respondent Webster's testimony was to the effect that, at the time the calls were alleged to have been made, he was flying his airplane, with Respondent Devers as a passenger, on a trip from Hancock, West Virginia, to Maryland.

At the instant trial, the State offered the testimony of two eyewitnesses, one of whom saw Devers in his automobile at the time of his alleged airplane trip, and both of whom recognized Devers' voice on the telephone; also offered testimony and records from Webster's former employer to the effect that he was at work at the time of the alleged airplane trip; and also offered certain prior admissions made by Webster.

Respondents offered elaborate testimony seeking to establish that the alleged airplane trip did, in fact, occur. Following this there was a conference in chambers concerning a requested continuance by the State for the purpose of securing the attendance of a newly discovered out-of-state witness. The trial judge refused to grant a continuance and in the course of discussion indicated that he felt the State's case was a disgrace but that he was going to let the case go to the jury even though, were he on the jury, he would vote for acquittal. Rebuttal testimony was then offered by the State following which Respondents' motions for judgments of acquittal were denied, the court stating that a jury question was presented by the evidence.

The Court of Special Appeals, concluding that the lower court's denial of the motions for judgment of acquittal were influenced by factors other than the evidence, refused to even consider whether or not the evidence was sufficient for the case to be submitted to the jury or to sustain the verdicts of guilty. There clearly was sufficient evidence. *Shelton v. State,* 198 Md. 408.

The decision by the Court of Special Appeals establishes dangerous precedent. No longer is there simply an objective test for reviewing sufficiency of the evidence. There has now been superimposed an additional subjective inquiry into the personal views and feelings of the trial judge. This clearly represents an invasion into the province of the jury and violates the constitutional restriction set forth in Article XV, Section 5, of the Maryland Constitution that in a criminal trial by jury, the court shall only pass upon the sufficiency of the evidence to sustain a conviction.

The Court of Special Appeals observed that the lower court also erred in failing to apply the proper standards in considering Respondents' motion for a new trial in light of *Pinkney v. State,* 9 Md. App. 283. The Court of Special Appeals did not reach the question of what result should follow from the failure of the lower court to apply the proper standards. Following a hearing by this Honorable

Court on the issue of sufficiency, the State respectfully requests the case be remanded to the lower court for reconsideration of the motion for a new trial in accordance with *Pinkney*.

CONCLUSION

For the reasons set forth above, Petitioner prays this Honorable Court to issue the Writ of Certiorari.

Francis B. Burch
Attorney General

Francis X. Pugh
Assistant Attorney General

IN THE
COURT OF APPEALS OF MARYLAND
SEPTEMBER TERM, 1970

[Caption omitted in printing]

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

The respondents, Raymond G. Devers and Bryan D. Webster, by their attorney, Arthur Dale Leach, respectfully requests that the request for a Writ of Certiorari be denied for the following reasons:

1. Article XV, Section 5, of the Constitution of Maryland, effective December 1, 1950, states that a decision of a trial court denying a motion for judgment of acquittal will be reversed on appeal only upon a showing that the decision was clearly wrong. The Court of Special Appeals has held that the decision of the trial judge was clearly wrong in that,

"[T]he Court denied the motions for judgment of acquittal because it was leaving the question of guilt to the jury 'no matter what.' That the Court was confident the jury would acquit was not a proper basis for denial of the motions. Nor could the Court properly slough its responsibility to decide whether or not the case should go to the jury because it had sat in other cases, apparently involving appellants, or because of 'hard feelings' on the part of the parties involved. We think appellants were entitled to have their motions determined by the Court applying the proper test and that the record affirmatively shows that the motions were not so determined."

2. The Court of Special Appeals stated that:

"In denying the motion for a new trial the lower court disposed of the ground that the weight and sufficiency of the evidence did not support the conviction by asserting that the weight and sufficiency of the evidence were not for it . . . This was manifestly incorrect with respect to the grant of a new trial. It discards completely the safety valve as to improper verdicts which is established by the rule as to new trials and which is a *raison d'etre* in giving trial courts discretionary power as to the grant of a new trial. The Court here clearly did not consider the weight of the evidence in determining the motion before it. This was as much as abuse of its discretion as the refusal to consider newly discovered evidence." See *Burley v. State*, 239 Md. 342, 344; *Givner v. State*, 208 Md. 1.

3. That the State has already instituted re-prosecution proceedings of the respondents in Prince George's County and that the respondents were arraigned before the Circuit Court for Prince George's County, Maryland, on May 28, 1970. Re-trial of this case has already been set for July 17, 1970 in the Circuit Court at Upper Marlboro, Maryland.

THEREFORE, an appeal by the State from the rulings of the Court of Special Appeals would be of no effect since

the State has already instituted criminal proceedings against the respondents.

4. That the decision of the Court of Special Appeals was ample and sufficient to cover the matter which was before them on appeal, and that the decision of that Court is good law and is in harmony with previous holdings of that Court. For the Court to have held other than it held in this case would be a miscarriage of justice and would set a precedent of improper legal principles.

5. That the Court of Special Appeals is not required to make decisions on all matters on the horizon simply because the office of the Attorney General of Maryland would like them to do so.

6. That the Court of Special Appeals made every decision necessary in the determination of this case.

THEREFORE, the Maryland Court of Appeals should decline to issue the Writ of Certiorari filed for in this case.

CONCLUSION

For the reasons set forth above, respondents pray this Honorable Court to deny the Writ of Certiorari.

PAULSON & LEACH

By: /s/ Arthur Dale Leach
Arthur Dale Leach
Attorney for Respondents
4314 Hamilton Street
Hyattsville, Maryland
779-7230 293-1080

APPENDIX C

IN THE COURT OF APPEALS OF MARYLAND

No. 200

SEPTEMBER TERM, 1970

[CAPTION OMMITTED IN PRINTING]

Hammond, C.J.
McWilliams
Finan
Singley
Digges,

JJ.

Opinion by Singley, J.

Filed: January 8, 1971

Raymond G. Devers and Bryan D. Webster were jointly tried before a jury in the Circuit Court for Prince George's County. Devers was found guilty of subornation of perjury and Webster of perjury. In *Devers and Webster v. State*, 9 Md. App. 366, 264 A.2d 261 (1970), the Court of Special Appeals reversed the convictions because it found error in the trial court's denial of motions for judgments of acquittal and for a new trial and remanded the cases for a retrial. We granted certiorari.

Devers' and Webster's convictions were the end product of a domestic dispute between Devers and his wife. In August, 1968, Mrs. Devers had left her husband and had gone to live with Mrs. Bernice Anderson. During the period from September to December 1968, Mrs. Devers or Mrs. Anderson had sworn out four criminal warrants, charging Devers with stealing his own lawnmower, disorderly conduct, disturbing the peace and making harassing telephone calls on 29 November and 23 December 1968, the latter

charge being in violation of Code (1957, 1967 Repl. Vol.) Art. 27, §555A.

These four charges came on for trial in February 1969 in the Circuit Court for Prince George's County before Bowie, J., and a jury. At the conclusion of the State's case, motions for judgments of acquittal were granted as to all the charges except that involving the telephone calls allegedly made at 7:35 and at 9:10 on the evening of 29 November, which Devers then defended. Webster, called as a witness in Devers' behalf, testified that on the day when the telephone calls were alleged to have been made, he had flown Devers to Hancock, West Virginia, leaving Hyde Field in Prince George's County at approximately 12:30 p.m. and returning to the field at approximately 8:30 p.m. On cross examination, Webster testified that he had not worked at the Chesapeake and Potomac Telephone Company in Silver Spring, Maryland, where he was employed, on 29 November. He said that he had worked on the 28th, which was Thanksgiving Day, but did not work on the 29th. Devers then took the stand and confirmed the story of the trip. The jury returned a verdict of not guilty.

Subsequently, Webster was indicted for perjury and Devers for subornation of perjury. The cases came on for trial in August, 1969, again before Bowie, J., and a jury.

There was testimony which both discredited and supported Devers' alibi. Both Mrs. Devers and Mrs. Anderson testified that they had recognized Devers' voice when the telephone calls were made. Mrs. Devers testified that she had seen her husband about 6 p.m. on 29 November in Lyle's Restaurant and again later that evening when he attempted to run his car into hers. Mrs. Anderson said she had not seen Devers but had seen his car chasing Mrs. Devers', when she opened the garage doors to admit Mrs. Devers' car.

Herbert Palm, a telephone company foreman, testified that the company's work schedule showed that Webster had not worked on Thanksgiving Day, but had worked on the 4:00 p.m. to midnight shift on Friday, 29 November, and

that a timecard, signed by Webster, bore this out. Edna May Rittershofer, a payroll processing supervisor for the telephone company, testified that the company's records showed that Webster had a holiday on Thanksgiving and worked on 29 November. Had he worked on Thanksgiving, he would have received $40 additional pay, which he had never claimed.

Creston Garner, Jr., Webster's immediate supervisor, called as a rebuttal witness by the State, testified that Webster was a switchman, scheduled to work on the 4:00 p.m. to midnight shift on 29 November; that two switchmen are the minimum who must be on duty; that between 4:00 p.m. and 5:00 p.m each day, it is his practice to verify that they are on duty, and that if Webster had not reported by 5:00 p.m. on 29 November he would have "panicked immediately" and made a record of the fact, which he had not.

There was considerable testimony adduced in support of the alibi. No witness testified that he had seen Webster at work, although Webster conceded that it was improbable that he would not have been seen by the other switchman. Terry Harden, whose mother had previously stayed at Devers' house, testified that he had met Devers and Webster at Lyle's Steak House on the morning of 29 November and had left Hyde Field with them at 11:30 a.m. in Webster's plane to fly to West Virginia to look at some family properties. He took them to the West Virginia airport about 7:00 p.m., but did not return with them.

Stephen E. Ellis testified that he saw the plane leave Hyde Field at 12:30. There was introduced in evidence Webster's pilot log, which contained an entry respecting the trip. Webster admitted that the entry had been made sometime later.

Vivian Springman, a practical nurse, worked for a registry run by Mrs. Lois Zagri. She testified that she and Mrs. Zagri had made an appointment to see Devers at Devers' house at 7:30 p.m. on 29 November. They went to Devers'

house, and finding him not there, drove to Hyde Field where Webster's plane arrived at about 8:30 p.m. Devers took Webster somewhere, and then returned to his house where he again met Vivian Springman and Mrs. Zagri. Mrs. Zagri substantiated this testimony.

Webster repeated the testimony which he had given at the earlier trial concerning the trip to West Virginia, but explained that he had reported for work about 11:00 p.m. on 29 November, and had worked the eight hours shown on his timecard by staying on the job until 6:30 a.m. He admitted that he had been mistaken when he testified at the earlier trial that he had worked on Thanksgiving.

Devers reiterated the testimony he had given at the earlier trial about the trip to West Virginia, and denied that he had seen his wife at Lyle's Steak House, or had attempted to run her off the road.

Just before the State put on Creston Garner, Jr., as a rebuttal witness, counsel had a conference with Judge Bowie in chambers at the request of the State. There were present James E. Fannon, Jr., Assistant State's Attorney; Vincent J. Femia, Assistant State's Attorney; James E. Kenkel, Deputy State's Attorney, and Arthur Dale Leach, counsel for the defendants. The purpose of the conference was the State's desire to obtain a continuance so that an out of state witness could be produced. In the course of a long colloquy, which ultimately resulted in a denial of a continuance, Judge Bowie made two comments:

> THE COURT: "* * * Now, Mr. Fannon [Assistant State's Attorney], let me say this, if this were the world's worst murder case, if this was a seriously involved case, if it were not for the fact that I sat on these other cases and had thrown the other three out—there are certain indications that have come into this trial which indicate they weren't fully and completely resolved, which they were. Now, I am just trying to say that that is the fact. Here you have got a family squabble in here and this case should never have gone to trial. If it

weren't for the fact I sat on those other cases, and if it weren't for my confidence the jury is going to acquit this man, I would give him a judgment of acquittal like that, and there isn't a court attendant that doesn't feel the same way about it. I don't know what has got in your craw, but I think this is one good reason why everybody is going to go out of office, really I do. I think this case is a disgrace. And I will say this to every one of you, it is an absolute disgrace. * * *"

* * * * *

"Somebody says out of the courtroom—the rumors that go all over the courthouse about what is going on here, and about some other criminal case that was involved, but I must say we are here to try this one case. And I will tell you if I hadn't sat in those others—and the people involved on the other side, there are such hard feelings by the phone company and by the people with Mrs. Devers, that the jury is going to get this case come no matter what. I am just going to let the jury determine it. I am not going to do it. But if I had to determine it I would throw it out in a minute."

The conference ended, and Mr. Garner testified. At the conclusion of all the evidence, the defendants renewed the motions made at the close of the State's case for judgments of acquittal. The motions were denied, and the case went to the jury, which returned guilty verdicts as to both men. Devers' and Webster's motion for a new trial was denied and each of them was sentenced to two years' imprisonment, but the sentences were suspended.

On appeal, the Court of Special Appeals reversed on the ground that the trial court erred in denying the motions for judgments of acquittal and because the court failed to apply the proper test in considering the motion for a new trial.

On the first point, the court said:

> "When a motion for judgment of acquittal is made in a jury case it is the function of the lower court to determine whether or not the evidence before it is sufficient in law to sustain a conviction. If it determines that it is, it should deny the motion and submit the case to the jury; if it determines that it is not, it should grant the motion and the case does not reach the jury. It is the function of this Court when the question is properly before it, to determine whether the lower court erred in denying a motion for judgment of acquittal. The test to be applied is whether the evidence shows directly or supports a rational inference of the facts to be proved, from which the jury could fairly be convinced, beyond a reasonable doubt, of the defendant's guilt of the offense charged. If there was such evidence there would be no error in denial of the motion; if there was no such evidence, denial of the motion would be reversible error. See *Williams v. State*, 5 Md. App. 450, 452-460.
>
> "However, the instant case does not reach us with regard to the denial of the motions for judgment of acquittal in the usual posture. We think it fundamental to the rights of a defendant that the lower court deny a motion for judgment of acquittal only on the basis that it has considered the evidence adduced, and recognizing that its weight and the credibility of the witnesses are matters for the jury, finds that the evidence in law was sufficient to sustain the conviction. We can only conclude that in the instant case the lower court's denial of the motion for judgment of acquittal made by each appellant at the close of all the evidence was influenced by other factors to the extent that the appellants were denied due process of law. Thus we must reverse the judgments and do so without reaching the question of the sufficiency of the evidence *per se*. We reach our conclusion from remarks made by the lower court. * * *" 9 Md. App. at 368-69

* * * * *

"We are constrained to conclude that the court denied the motions for judgment of acquittal because it was leaving the question of guilt to the jury 'no matter what.' That the court was confident the jury would acquit was not a proper basis for a denial of the motions. Nor could the court properly slough its responsibility to decide whether or not the case should go to the jury because it had sat in other cases, apparently involving appellants, or because of 'hard feelings' on the part of the parties involved. We think appellants were entitled to have their motions determined by the court applying the proper test and that the record affirmatively shows that the motions were not so determined. * * *" 9 Md. App. at 370

On the second point, the Court said:

"* * * We noted in *Pinkney [Pinkney v. State*, 9 Md. App. 283, 263 A.2d 871 (1970)] that the test as to the sufficiency of the evidence with respect to the grant of a new trial is broader in scope than the test as to the sufficiency of the evidence with respect to the grant of a motion for judgment of acquittal. For in determining a motion for judgment of acquittal the lower court does not weigh the evidence or judge the credibility of the witnesses; those matters are for the trier of fact. But in determining a motion for a new trial, the lower court must weigh the evidence and judge the credibility of the witnesses; only in so doing is it able to ascertain whether there is such a preponderance of proof in favor of the accused 'as to show that manifest injustice has been done by the verdict.' See *Johnson v. State*, 219 Md. 481, 483; *Brown v. State*, 237 Md. 492, 499. In denying the motion for a new trial the lower court [*i.e.*, Bowie, J.] disposed of the ground that the weight and sufficiency of the evidence did not support the conviction by asserting that the weight and sufficiency of the evidence were not for it. It said:

> 'We conclude that the weight and sufficiency of the evidence is for the jury to decide and not for the Court. Once the case goes to the jury, assuming that it properly is presented to the jury on a question of fact, then the weight and sufficiency of the evidence is totally for the jury and not for the Court to determine, on a motion for judgment of acquittal at the end of the State's case and at the end of the entire case, as to whether there is sufficient evidence to present a question of fact of guilt or innocence to the jury. We concluded, on the basis of the State's theory of the case, that they had presented sufficient to go to the jury and for the jury to consider it. Once this was done, of course, the weight and sufficiency was up to the jury.'
>
> This was manifestly incorrect with respect to the grant of a new trial. It discards completely the safety valve as to improper verdicts which is established by the rule as to new trials and which is a *raison d'etre* in giving trial courts discretionary power as to the grant of a new trial. The court here clearly did not consider the weight of the evidence in determining the motion before it. This was as much an abuse of its discretion as the refusal to consider newly discovered evidence. See *Burley v. State*, 239 Md. 342, 344; *Givner v. State*, 208 Md. 1." 9 Md. App. at 371-73

We take a somewhat different view of the matter. We find error neither in the denial of the motions for judgments of acquittal nor in the denial of the motion for a new trial.

The Motions for Judgments of Acquittal

One of the oddities of our practice is that by virtue of the Constitution of Maryland (1867) Art. XV, §5, "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact." The history of this provision is treated in *Wyley v. Warden, Md. Penitentiary*, 372 F.2d 742 (4th Cir. 1967), *cert. denied*, 389 U.S. 863, 88 S.Ct. 121,

19 L.Ed.2d 131 (1967). An amendment to our Constitution, which became effective 1 December 1950, left the basic concept undisturbed but added the proviso, "except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." Prior to the adoption of this amendment, this Court had no power to review the sufficiency of evidence on appeal of a criminal case tried to a jury. Compare *Brown v. State*, 237 Md. 492, 499, 207 A.2d 103 (1965) and *Giles v. State*, 229 Md. 370, 384, 183 A.2d 359 (1962) with *Slansky v. State*, 192 Md. 94, 63 A.2d 599 (1949).

The amendment had been implemented by Chapter 596 of the Laws of 1949, now Code (1957, 1967 Repl. Vol., 1970 Cum. Supp.) Art. 27, §593:

> "§593. Jury to be judges of law and fact; motion for judgment of acquittal on ground of insufficiency of evidence.
>
> "In the trial of all criminal cases, the jury shall be the judges of law, as well as of fact, except that at the conclusion of the evidence for the State a motion for judgment of acquittal on one or more counts, or on one or more degrees of an offense, may be made by an accused on the ground that the evidence is insufficient in law to justify his conviction as to any such count or degree. If the motion is denied, he may offer evidence on his own behalf without having reserved the right to do so, but by so doing, he withdraws his motion. The motion may be made at the close of all the evidence whether or not such motion was made at the conclusion of the evidence for the State. If the motion is denied the defendant may have a review of such ruling on appeal."

and by Rule 755:

> "Rule 755. Motion for Judgment of Acquittal.
>
> "a. *Supersedes Motion for Directed Verdict.*
>
> The motion for a directed verdict of not guilty and the motion for an instruction that the evidence

is insufficient in law to sustain a conviction are abolished and the motion for judgment of acquittal shall be used in their place.

"b. *When Made.*

A motion for judgment of acquittal on one or more counts, or on one or more degrees of an offense, may be made by an accused at the close of the evidence offered by the State, or may be made at the close of all the evidence, whether or not such motion was made at the close of the evidence offered by the State. If the motion is not granted at the close of the evidence offered by the State, the accused may offer evidence without having reserved the right to do so, but by so doing, he withdraws his motion.

"c. *Action by Court.*

If the court on such motion or on its own motion determines that a judgment of acquittal should be granted, it shall direct the clerk to enter a judgment of acquittal on one or more counts, or one or more degrees of an offense which by law is divided into degrees, and to note that it has been entered by the direction of the court. If the case is tried before a jury it shall not be necessary for the jury by its foreman, or otherwise, to render a verdict."

which taken together, permit a defendant in a criminal case being tried before a jury to move for a judgment of acquittal at the close of the evidence offered by the State and again at the close of all the evidence, and in the event the motion is denied, the ruling may be reviewed on appeal, *Gray v. State*, 254 Md. 385, 255 A.2d 5 (1969). As a practical matter this permits the court to which an appeal is taken to pass on the sufficiency of the evidence, *Giles v. State, supra*. The function of the appellate court is limited, however. It does not inquire into and measure the weight of the evidence to ascertain whether the State has proved its case beyond a reasonable doubt, *Brown v. State, supra*, 237 Md. at 497 but merely ascertains whether there is any relevant evidence, properly before the jury, legally sufficient

to sustain a conviction. *Pressley v. State*, 244 Md. 664, 667, 224 A.2d 866 (1966); *Royal v. State*, 236 Md. 443, 448, 204 A.2d 500 (1964); *Tull v. State*, 230 Md. 596, 604, 188 A.2d 150 (1963); *Lee v. State*, 224 Md. 260, 167 A.2d 595 (1961); *Drouin v. State*, 222 Md. 271, 288, 160 A.2d 85 (1960); *Wright v. State*, 219 Md. 643, 652, 150 A.2d 733 (1959); *Briley v. State*, 212 Md. 445, 447, 129 A.2d 689 (1957).

The application of this approach to the case before us is a simple one. If the jury chose to believe the State's witnesses and disbelieve the testimony of the defendants and their witnesses, as it obviously did, there was evidence legally sufficient to sustain the convictions. Under its view of the case, the Court of Special Appeals never reached "the question of the sufficiency of the evidence *per se*."

The offense of perjury consists of swearing falsely and corruptly, without probable cause of belief. To be willful, the false oath must be deliberate and not the result of surprise, confusion or bona fide mistake, *Brown v. State*, 225 Md. 610, 171 A.2d 456 (1961); 3 Wharton, *Criminal Law and Procedure* §§ 1290, 1291 (Anderson ed. 1957); Code (1957, 1967 Repl. Vol.) Art. 27, §§ 435, 437. Maryland no longer requires that perjury be established by the direct testimony of two witnesses, as was the case at common law. It is enough that there is testimony of one witness and other independent corroborative evidence is of such a nature so as to be of equal weight to that of at least a second witness, thus foreclosing any reasonable hypothesis other than the defendant's guilt. *Brown v. State, supra*, 225 Md. at 615.

Subornation of perjury is the procurement of another to make a false oath, Code, Art. 27, § 438. Since subornation is, in substance, the same as perjury, the same proof of the perjured statement is required together with proof that the statement was procured by the accused, *Hammer v. United States*, 271 U.S. 620, 628, 46 S.Ct. 603, 70 L.Ed. 1118 (1926), but see *Boddie and Brooks v. State*, 6 Md. App. 523, 535, 252 A.2d 290 (1969). Devers called Webster as a witness in the earlier trial, certainly knowing that

Webster would testify about the plane trip, which Devers then substantiated by his own testimony. There was evidence, if believed, sufficient to sustain the convictions.

There remains, of course, the question of Judge Bowie's remarks during the conference in chambers. The Court of Special Appeals took these as an indication that Judge Bowie meant that the evidence was insufficient to sustain a conviction.[1] We do not read them in quite the same way. To us it seems obvious that Judge Bowie was irked by the fact that the State's Attorney's office had permitted itself to become embroiled in what he regarded as no more than a family quarrel, which had aroused "hard feelings." Because he had sat in the earlier cases, where he had entered judgements of acquittal in three of the cases and the jury had returned a not guilty verdict in the fourth, Judge Bowie preferred that the perjury and subornation of perjury cases go to the jury "no matter what." The fact that Judge Bowie thought the jury would acquit was a conclusion based on his own appriasal of the weight of the evidence and the credibility to be given the witnesses, a function which was exclusively that of the jury. As it turned out, the jury looked at it differently.

There is no suggestion that it was his conclusion that there was no evidence, if believed by the jury, sufficient to sustain a conviction. This is essentially what Judge Bowie was saying when he denied the motions for judgments of acquittal:

> "Well, we think that nevertheless that has created a question of fact which the jury must resolve as we had indicated in chambers when we were on the record.[2] We feel that this case does not present a

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[1] It should be noted that his remarks were made prior to Mr. Garner's testimony.

[2] Here, Judge Bowie was referring to the Garner testimony.

> question for the jury, a question of fact to determine whether or not the defendants are guilty as charged."

and at the hearing on the motion for a new trial repeated that the court could not substitute its opinion for that of the jury.

The Motion for a New Trial

Rule 759 a, Motion for New Trial, provides:

> "A motion for a new trial shall be made pursuant to Rule 567 (New Trial). A motion for a new trial shall be heard by the court in which the motion is pending. The Court may grant a new trial if required in the interest of justice."

See also Code, Art. 27, § 594.

The following is a quotation from Hochheimer, *The Law of Crimes and Criminal Procedure* § 184 at 209-10 (2d ed. 1904):

> "* * * Upon conviction, a new trial may be ordered by the court, upon its own motion, or at the instance of the defendant, or one or more of several defendants, at any time before judgment, for any matter extrinsic to the record whereby it appears that there was a defect of substantial justice at the former trial. * * * The matter of granting a new trial is discretionary with the trial court; but the defendant is entitled to have the application therefor passed upon and material evidence presented by him received.
>
> "The principal grounds for granting a new trial are, that the verdict was contrary to the evidence; newly discovered evidence; accident and surprise; misconduct of jurors or the officer having them in charge; bias and disqualification of jurors (disqualification not entitling to a new trial, however, if there was opportunity to challenge); misconduct or error of the judge; fraud or misconduct of the prosecution, *e.g.*, abuse of argument."

The opinion in *Pinkney v. State, supra*, would appear to go beyond the grounds enumerated by Hochheimer and would permit the trial court to weigh the evidence and consider the credibility of witnesses to determine not whether the verdict was against the preponderance of the evidence, but whether there was such a preponderance of evidence on the side of the defendant "as to show that manifest injustice has been done by the verdict, and to warrant the conclusion either that the jury have mistaken or failed to weigh the evidence properly, or to apply legal principles, or to arouse suspicion of corruption, prejudice, or partiality on the part of the jury,"[3] 9 Md. App. at 296, and the opinion in *Devers, supra*, refers to a new trial as "the safety valve as to improper verdicts," which requires a consideration of the weight of the evidence, 9 Md. App. at 372-73.

As we shall shortly demonstrate, the Court of Special Appeals was in error in both *Pinkney* and *Devers* when it concluded that the test of the sufficiency of the evidence with respect to the grant of a new trial is broader in scope than with respect to the grant of a motion for judgment of acquittal.

It was long held that the ruling of the trial court on a motion for a new trial lay within the sound discretion of the trial court and could not be reviewed on appeal. See, for example, *Archer v. State, supra*, 45 Md. 457; *Myers v. State, supra*, 137 Md. 482; *Wilson v. State*, 181 Md. 1, 8, 26 A.2d 770 (1942); *Quesenbury v. State*, 183 Md. 570, 572, 39 A.2d 685 (1944); *Herring v. State*, 189 Md. 172, 55 A.2d 332 (1947); *Haley v. State*, 200 Md. 72, 77, 88 A.2d 312 (1952); *Williams v. State*, 204 Md. 55, 66, 102 A.2d 714 (1954); *Madison v. State*, 205 Md. 425, 433, 109 A.2d 96 (1954). In *Quesenbury*, on appeal from the

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[3]The quotation is from 5 Wharton, *Criminal Law and Procedure* §2166 at 355, 356 (Anderson ed. 1957).

Circuit Court for Prince George's County, where the defendant alleged insufficiency of the evidence in support of his appeal from a denial of his motion for a new trial, Judge Melvin, speaking for the Court, said:

> "That this is a matter addressed directly and solely to the discretion of the trial court on a motion for a new trial, following the determination by the jury of the sufficiency of the evidence, is too plain for comment. This Court has repeatedly ruled in so many words that the question of the legal sufficiency of evidence in a criminal case to sustain a conviction is exclusively for the jury to determine. *Berger v. State*, 179 Md. 410, 20 A.2d 146 [1941]; *Deibert v. State*, 150 Md. 687, 133 A. 847 [1926]; *Willie v. State*, 153 Md. 613, 139 A. 289 [1927]." 183 Md. at 573.

In *Debinski v. State*, 194 Md. 355, 362, 71 A.2d 460 (1950), there was an intimation that the denial of a motion for a new trial might be reviewable on appeal where there was a clear abuse of discretion by the trial court. This qualification was repeated in *Givner v. State*, 208 Md. 1, 7, 115 A.2d 714 (1955); *Thomas v. State*, 215 Md. 558, 561, 138 A.2d 878 (1958); *McCoy v. State*, 236 Md. 632, 204 A.2d 565 (1964), *cert. denied*, 380 U.S. 986, 85 S.Ct. 1358, 14 L.Ed.2d 279 (1965) and in *Burley v. State*, 239 Md. 342, 344, 211 A.2d 714 (1965).

Givner v. State, *supra*, 208 Md. 1 and *Burley v. State*, *supra*, 239 Md. 342, are authority for the proposition that the denial of a new trial where the motion is grounded on newly discovered evidence may well be just such a clear abuse of discretion as will make the denial reviewable.

The Court of Special Appeals has consistently followed the rule, subject to the exception, *Adams v. State*, 4 Md. App. 135, 241 A.2d 591 (1968); *Stallard v. State*, 6 Md. App. 560, 252 A.2d 267 (1969); *Elder v. State*, 7 Md. App. 368, 255 A.2d 91 (1969).

It was not until *Pinkney*, *supra*, 9 Md. App. 283, however, that the Court of Special Appeals suggested, and not

until *Devers, supra,* 9 Md. App. 366, that it invoked the proposition that the review of the denial of a motion for a new trial in a criminal case after conviction on a jury verdict called for a weighing of the evidence and a consideration of the credibility of the witnesses. This is not the teaching of our prior decisions which the Court of Special Appeals cited.

Brown v. State, 237 Md. 492, 207 A.2d 103 (1965) and *Johnson v. State,* 219 Md. 481, 150 A.2d 446 (1959), upon which *Pinkney* placed principal reliance, were both decided before Constitution, Art. IV, § 33 was amended in 1966. Prior to the amendment, § 33, which deliberated the jurisdiction of the Supreme Bench of Baltimore City, which consists of the judges of Baltimore's nisi prius courts, provided in part:

> "The said Supreme Bench of Baltimore City * * * *shall also have jurisdiction to hear and determine all motions for a new trial in cases tried in any of said Courts, where such motions arise either, on questions of fact, or for misdirection upon any matters of law, and all motions in arrest of judgment, or upon any matters of law determined by the said Judge, or Judges, while holding said several Courts;* * * *"* (emphasis supplied)

It is the italicized portion which was deleted by the amendment.

When our predecessors were called upon to consider this provision as it stood prior to amendment in *Roth v. House of Refuge,* 31 Md. 330 (1869) they said:

> "It will be observed that the power given to this Court is large and comprehensive. If there be *any matter of law* determined by the judges in the several courts [of Baltimore City], except it be in cases of appeal from justices of the peace, it is liable to be reheard and determined by the Supreme Bench; the great object being to secure uniformity of decision, and greater deliberation of judgment than was prac-

ticable in the separate courts, presided over by a single judge." 31 Md. at 333 (emphasis in original)

We had occasion to comment on the provision in *Johnson v. State, supra*, 219 Md. at 483 where Judge (later Chief Judge) Prescott, speaking for the Court, said:

> "* * * This constitutionally granted power to hear motions for new trials is unusual, if not unique; such authority usually emanating from legislative enactment or inveterate custom and usage.
>
> "* * * *Often, where an appeal does lie the powers of review of the Supreme Bench in ruling upon the motion for a new trial are broader in scope than those of this Court. It may weigh the evidence in a criminal case even though the case was tried before a jury, and grant a new trial in its sound discretion.*" (emphasis supplied)

which was followed in *Brown v. State, supra*, 237 Md. at 499.

It should be remembered that *Johnson* and *Brown* were decided *after* the 1950 amendment of Art. XV, § 5 which gave the court, in the trial of a criminal case before a jury, the power to pass upon the sufficiency of the evidence to sustain a conviction, but *before* the 1966 amendment of Art. IV, § 33 which took from the Supreme Bench the constitutional grant of power which we had construed as entitling it to weigh the evidence in considering a motion for a new trial of a criminal case which had been tried before a jury. This grant of power, shared by no other court in Maryland, which we termed "unusual, if not unique" in *Johnson*, rested from 1867 until 1966 in the Supreme Bench of Baltimore City, and nowhere else.[4] It never

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[4]It is interesting to note that the General Assembly, possibly in anticipation of the amendment of Art. IV, § 33, enacted Chapter 667 of the Laws of 1965, which added a new § 262A to Art. IV of the Code of Public Local Laws of Maryland. This provision, which took effect 1 June 1965, may be found in Code of Public Local Laws of Baltimore City (1969) as § 22-40.

extended to this Court, and would not have extended to the Court of Special Appeals had it been in existence prior to the adoption of the amendment. As matters stood after the amendment, if evidence is to be weighed on a motion for a new trial after a jury has returned a guilty verdict in a criminal case, the power to do so must be derived from the 1950 amendment to Constitution, Art. XV, § 5, and we have no difficulty in holding that it is not, *Brown v. State, supra,* 237 Md. at 497. The grant to the trial court of the power "to pass upon the sufficiency of the evidence to sustain a conviction" means to us precisely what it meant to Judge Bowie: that the test of sufficiency to be applied in considering a motion for a new trial is exactly that applied in considering a motion for judgment of acquittal: was there any relevant evidence, properly before the jury, legally sufficient to sustain a conviction? Any wider scope of review of the evidence would be impermissible under our Constitution.

Motions for New Trial

> "The judge or judges before whom any case is tried in the Criminal Court of Baltimore (and the several parts thereof as heretofore, or may hereafter be instituted), shall have exclusive jurisdiction to hear and determine, and the said judge or judges shall hear and determine, all motions for a new trial where such motions arise, either on questions of fact or for misdirection upon any matters of law, and all motions in arrest of judgment, or upon any matters of law, determined by the said judge or judges."

Since this has no applicability to the case at bar, which was not tried in Baltimore, we do not wish to be understood as passing upon the effect or validity of § 667 after the date when the amendment of Constitution, Art. IV, § 33 became effective. Chapter 668 of the Laws of 1965 eliminated any reference to the Supreme Bench in Code, Art. 27, § 594 which, as amended, now provides that motions for new trials in criminal cases shall be heard by the trial court.

Judge Delaplaine, speaking for the Court, observed in *Shelton v. State*, 198 Md. 405 at 412, 84 A.2d 76 (1951), the first case before this Court after Constitution, Art. XV, §5 had been amended:

> "While the Court of Appeals now has the constitutional authority to pass upon the sufficiency of the evidence to sustain a conviction in a criminal case tried before a jury, this Court will not inquire into or measure the weight of the evidence, and will not reverse the judgment if there is any proper evidence before the jury on which to sustain a conviction."

This should not be taken to mean, however, that the trial court is precluded from granting a new trial in a criminal case where the jury's verdict is clearly contrary to the evidence, because this stems from venerable custom and usage, Blackstone, *Commentaries on the Law*, Book 4, Chapter 27 at 910 (Gavit ed. 1941). The granting of a new trial in such a case involves no more than a determination by the trial court that the evidence was insufficient to sustain a conviction. Moreover, when the interest of justice requires it, the granting of a new trial in a criminal case tried to a jury, lies within the sound discretion of the trial court. Rule 759-A (*supra*) of granted on matters extrinsic to the record. Hochheimer at . The granting of a motion for a new trial in a civil case cannot be analogized, however, for there, the trial judge may weigh the evidence to determine whether the verdict is determined by a preponderance of the evidence. As we said in *Edwards v. State*, 198 Md. 132, 157-58, 81 A.2d 631 (1950):

> "* * * In any case, civil or criminal, to meet the test of legal sufficiency, evidence (if believed) must either show directly, or support a rational inference of, the fact to be proved. In a civil case the fact must be shown, or the inference supported, by a preponderance of probability or an opposite preponderance must be overcome. In a criminal case the fact must be shown, or the inference supported, beyond a rea-

> sonable doubt or to a moral certainty, or a reasonable doubt of an opposite fact must be created. The difference in degree of proof is ordinarily for the triers of facts."

See, also, *Snyder v. Cearfoss*, 186 Md. 360, 368, 46 A.2d 607 (1946); 2 Poe, *Pleading and Practice* §336 at 317 (5th ed. 1925).

It should also be pointed out that when a criminal case is tried by the court, sitting without a jury, the case is considered in a somewhat different fashion on appeal. Former Rule 7(c) of the Criminal Rules of Practice and Procedure provided that:

> "When a criminal charge has been so tried by the Court, an appeal may be taken as provided by law. Upon appeal the Court of Appeals may review upon both the law and the evidence to determine whether in law the evidence is sufficient to sustain the conviction, but the verdict of the trial court shall not be set aside on the evidence, unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In *Lambert v. State*, 196 Md. 57, 68, 75 A.2d 327 (1950), the first case in which Rule 7(c) was applied, we said: "[The Rule] was not intended, and will not be construed, to permit us to reverse judgments merely because our conclusion on the record is different from that of the trial judge. It is only intended to prevent manifest error." Present Rule 772 which has the effect of applying Rule 1086 to criminal cases leaves appellate review in the same posture. In a criminal case, tried without a jury, the findings of fact of the trial judge will not be disturbed unless clearly erroneous, *Tucker v. State*, 244 Md. 488, 224 A.2d 111 (1966).

Nor should our conclusion be taken to mean that a motion for a new trial cannot be granted at the instance of the defendant in a criminal case tried to a jury where the

verdict is contrary to law, *Slansky v. State, supra*, 192 Md. at 108, for while Maryland juries are judges of the law, an improper or unwarranted conclusion can be set aside.

JUDGMENTS OF THE COURT OF SPECIAL APPEALS REVERSED; JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IN CRIMINAL TRIALS NO. 8996 REINSTATED; JUDGMENT OF THAT COURT IN CRIMINAL TRIALS NO. 8997 REINSTATED; COSTS HERE AND IN THE COURT OF SPECIAL APPEALS TO BE DIVIDED BETWEEN APPELLEES AND PAID BY THEM.

STATE OF MARYLAND, Appellant	*	
	*	IN THE
v.	*	COURT OF APPEALS
	*	FOR
RAYMOND GEORGE DEVERS	*	MARYLAND
and	*	
BRYAN D. WEBSTER,	*	No. 200, September
Appellees	*	Term, 1970

MOTION FOR REARGUMENT

Raymond George Devers and Bryan D. Webster, Appellees, by Francis X. Gaegler, Jr., their attorney, moves, pursuant to Maryland Rule 850 for a reargument of this appeal and in support thereof respectfully shows:

(1) The appeal in this case was argued on December 10, 1970.

(2) On January 8, 1971, the Maryland Court of Appeals rendered its decision in favor of the State and against the Appellees, reversing the Special Court of Appeals and reinstating the judgment of the Seventh Judicial Circuit Court of Prince George's County.

(3) Appellees, Raymond George Devers and Bryan D. Webster, seek a reargument upon the following grounds:

ARGUMENT

THE COURT ERRED IN THAT IT HAS DENIED THE CIRCUIT COURTS IN THE STATE OF MARYLAND IN CRIMINAL CASES TRIED BY JURY THE INHERENT POWER TO GRANT A MOTION FOR A NEW TRIAL BASED ON THE GROUND OF A VERDICT CONTRARY TO THE EVIDENCE.

The Maryland Court of Appeals on January 8, 1971, stated in respect to the granting of a new trial and especially this limiting power as follows:

"This should not be taken to mean, however, that the trial court is precluded from granting a new trial in a criminal cases when the jury's verdict is clearly contrary to the evidence because this stems from venerable custom and usage, Blackstone, Commentaries on the Law, Book 4, Chapter 27 at 910 (Gavit ed. 1941; see Hockheimer, supra at 210). The *granting of a new trial in such cases involves no more than a determination by the trial court that the evidence was legally insufficient to sustain a conviction.*" (underscoring emphasis inserted by appellees)

That your Appellees suggest that the aforesaid statement by the Maryland Court of Appeals is not the law and has never been the law in respect to the county circuit courts but rather that the county circuit courts in a criminal case trial by a jury had the right and the duty when a defendant has filed a timely motion for a new trial on the grounds of an evidential nature, to do the following:

a. If the ground on the motion is insufficiency of evidence, the trial court must examine the evidence and determine if there is any relevant evidence to prove beyond a reasonable doubt the elements of the trial and further whether or not the defendant participated, however,

b. *If the ground alleged in the motion is that the verdict is contrary to the weight of the evidence and shocking to the conscience of the court and is manifestly unjust, the court thereupon must examine the evidence as to its weight so as to determine whether or not it shocked the conscience of the court. The trial judge has a duty to make this determination and if he fails to exercise this duty by not examining the evidence as to its weight, it is manifestly an abuse of discretion.*

It is further suggested that it is in this aspect of the verdict being contrary to the weight of the evidence and shocking to the conscience of the court that the Maryland Court of Appeals has erred in the application of comparing the Baltimore City judiciary system to the judiciary system that is used in the circuit courts throughout the State (prior to 1966). Understandably this confusion of the two systems has arisen by virtue of the unique rights which were given to the Baltimore Supreme Bench, a group of judges sitting en banc, and who had not heard the original case, and who had been given the right under the Maryland Constitution, Article IV, Section 33, to hear a motion for a new trial based both as to an error of fact or law.

In 1966 by virtue of a constitutional amendment the power of the Supreme Bench to hear these motions was withdrawn and thereupon the power to hear the motion for a new trial was invested in the various courts in Baltimore City. In other words, the Judge, who heard the case in a criminal matter, with or without a jury, prior to 1966, in Baltimore City, did not have the right to grant a new trial for any reason; this right was only in the Supreme Bench. The unique system in Baltimore City arose by the fact that there were a great number of judges within Balti-

more City as well as various courts, i.e., Court of Common Pleas, Baltimore City Court, Circuit Court, etc., and by virtue of the 1867 Maryland Constitution there was an attempt to have uniformity with the Baltimore City Courts by the use of the Supreme Bench.

The judiciary system that was in operation in Baltimore City in respect to a motion for new trial did not pertain to the various county circuit courts, Maryland Constitution, Article IV, Section 20.

The respective county circuit courts have always had and still have the inherent power to grant a new trial in a criminal case tried by jury either or both as to the law or evidence. It is in this area of evidential matter when a criminal case is tried by a jury that the Court of Appeals was in error since it has confused the two concepts (1) a verdict contrary to the weight of the evidence, and (2) a verdict which is insufficient as a matter of law.

It is further suggested that it would appear by virtue of the Maryland Court of Appeals' ruling in this case, that notwithstanding the revisory powers of Maryland Rule 764 b 2, the trial judge cannot grant a new trial when the verdict is contrary to the evidence or by the same force of reasoning, could not grant a motion for a new trial based on newly discovered evidence since both would disturb the findings of the jury. It is obvious that the trial judge has the inherent power to grant a new trial for both grounds.

An exhaustive search of the authorities in the Prince George's Library would reveal as follows:

Anderson's Wharton's Criminal Law and Procedure, Vol. 5 (1957 Ed.)

Sec. 2166

"But that a verdict is against the preponderance of evidence is no objection unless there is such a preponderance of proof on the other side as to show that manifest injustice has been done by the verdict, and to warrant the conclusion either that the jury

have mistaken or failed to weigh the evidence properly or to apply legal principals, or to arouse suspicion of corruption, prejudice or partiality on the part of the jury."

see *Dunlap v. U.S.*, 43 F.2d 999, app. dis. 45 F.2d 1021

Bishop's New Criminal Procedure, Vol. 1 (1895 Ed.)

Sec. 985, as to jurors who are judges of law and evidence has this to say:

"If obeying their own consciences and disobeying the judge they return a verdict of acquitted, he can neither punish them nor set the verdict aside, though he can set aside a conviction. This power of granting a new trial, therefore, furnishes, in reason, the test of the right of the jury."

Sec. 1268

"is generally in our States, without statutory aid, available to the party defeated in any superior court . . . , whereupon good cause being shown, the verdict will be set aside and the case tried anew as on a first trial"

* * * * *

"a decision granting or refusing a new trial may be carried for review to a higher tribunal if the question is strictly of law, but . . . not at all if of mere discretion in the lower court."

Sec. 1274

"Ordinarily, as where the new trial is asked because the verdict is against the weight of the evidence, and the like, it will be more readily granted by the judge who saw and heard the witnesses and is familiar with the entire case than by a court of review . . . ."

Sec. 1275

"if evidence legally inadequate Court must set aside verdict"

Sec. 1278

"Court has power to set aside verdict against the weight of evidence although some courts say no."

GOULD, Maryland Criminal Pleading (1936)

p. 317

Form 79 - Defendant's Motion for New Trial (Montgomery County)

1. Verdict is against the evidence
2. Verdict is against the weight of the evidence
3. Evidence is insufficient in law

Abbott's Trial Brief (2 ed) Criminal Causes (1889)

p. 738

"A court of general jurisdiction has inherent power, in the absence of a statute, to grant a new trial on motion . . . if satisfied that justice has not been done."

Lastly, the Attorney General in the *Pinkney v. State*, 9 Md. App. 283, did not appeal the ruling of the Court of Special Appeals having recognized that the trial court had the inherent power to grant a new trial when the verdict was manifestly unjust and contrary to the evidence. As a matter of fact in the Attorney General's brief, in the Devers' and Webster's case, the position of the Attorney General was: "Appellant's position is not the same with respect to the court's reasoning on motions for a new trial. Not only is it not prohibited by the Constitution, it also does not appear disruptive to the trial of criminal cases to allow a trial judge, reflecting upon the evidence, to decide that the interests of justice require a new trial. This decision obviously can only be made by the trial judge who had the opportunity to observe the witnesses and hear their testimony." (page 17 of Appellant's brief)

In his conclusion the Attorney General requested that the case be remanded to the Circuit Court for reconsideration of Appellees' motion for a new trial.

In addition, the matter was not completely briefed or argued and, therefore, it is requested that this motion for reargument be granted so that we can present this matter fully to the full bench.

CONCLUSION

For the foregoing reasons, it is urged that this motion for reargument be granted.

Respectfully submitted,

/s/ Francis X. Gaegler, Jr.
Attorney for Appellees

STATE OF MARYLAND Appellant vs. RAYMOND G. DEVERS and BRYAN D. WEBSTER Appellees	IN THE COURT OF APPEALS OF MARYLAND SEPTEMBER TERM 1970, NO. 200

MOTION TO STAY ISSUANCE OF MANDATE PENDING REVIEW BY THE SUPREME COURT OF THE UNITED STATES

Raymond G. Devers and Bryan D. Webster, appellees, by Arthur Dale Leach, their attorney, moves pursuant to Maryland Rule 876b that the issuance of the mandate herein be stayed pending application for review of the judgment of this court by the Supreme Court of the United States. The grounds of the motion are as follows:

1. Appellees intend to file a timely petition for certiorai in the Supreme Court of the United States.

2. The petition will present the following substantial federal constitutional questions which, for the reasons set forth, are sufficiently important and debatable as to raise a reasonable prospect that at least four members of the Supreme Court will vote to review the case.

(a) Two appellant courts are in direct contradiction as to whether the appellees have been denied due process of the law.

(b) Both appellees were denied due process of the law guaranteed to them under the federal constitution, to wit: (1) the Trial Judge, upon motion for a new trial by appellees, refused to consider the weight and sufficiency of the evidence and to judge the credibility of the witnesses, upon the mistaken assumption that he could not order a new trial even though it was evident from his statements that a manifest injustice had been done by the verdict. This discards completely the "safety valve" which is to be exercised by a Trial Judge to safeguard against a miscarriage of justice and improper verdicts. Without this dual protection of the jury and the judge no citizen of this state of the United States can have what is considered a fair trial. To emasculate the judge of his position as a fair arbiter and overseer of justice, he must have this basic right to set aside a jury verdict which is so shocking to his conscience that he cannot be silent. As the Court of Special Appeals stated in the instant case (page 5):

> "It discards completely the safety valve as to improper verdicts which is established by the rule as to new trials and which is a *raison d'etre* in giving trial courts discretionary power as to the grant of a new trial. The court here clearly did not consider the weight of the evidence in determining the motion before it. This was as much an abuse of its discretion as the refusal to consider newly discovered evidence." *Johnson v. State,* 219 Md. 481, 483; *Brown v. State,*

237 Md. 492, 499; *Burley v. State*, 239 Md. 342, 344; *Givner v. State*, 208 Md. 1; *Pinkney v. State*.

(c) The lower court's denial of the motion for judgment of acquittal made by each appellee at the close of all the evidence was improperly influenced by other factors rather than the proper basis, to wit, that it has considered the evidence adduced, and recognizing that its weight and the credibility of the witnesses are matters for the jury, finds that the evidence in law was sufficient to sustain the conviction. These "other factors" influenced the Trial Judge to the extent that the appellees were denied due process of law. (pg. 2 Opinions, Special Court of Appeals).

(d) The revisory powers of the Trial Judge pursuant to Maryland Rule 764b2 have been unconstitutionally circumscribed and limited by the Maryland Court of Appeals ruling in this case, to wit, the Trial Judge can no longer grant a new trial when the verdict is contrary to the evidence or by the same force of reasoning, could not grant a motion for a new trial based on newly discovered evidence. The Attorney General of the State of Maryland recognizes that this is an improper restriction on the Trial Judge and so stated on page 7 of Appellant's brief, and we quote,

> "Appellant's position is not the same with respect to the Court's reasoning on motions for a new trial. Not only is it not prohibited by the Constitution, it also does not appear disruptive to the trial of criminal cases to allow a Trial Judge, reflecting upon the evidence, to decide that the interests of justice require a new trial. This decision obviously can only be made by the Trial Judge who had the opportunity to observe the witnesses and hear this testimony."

(e) The basic questions set forth above are so inherent in the question of fair trial and due process and the opinion of this court in its decision with respect to this case is so novel and unique and inconsistent with its own previous decisions and that of the federal courts that appellees feel that it is a matter of importance establishing the basic rights to due

process and fair trial under the federal Constitution that the Supreme Court will hear and rule upon it.

3. If the mandate issue issues and the judgment of this court is made final, the appellees will be irreparably and seriously injured in that they will be convicted perjurers and will suffer the consequences thereof even though the matter has not been finally determined by the appellate procedures guaranteed to all citizens of the United States under the federal laws and Constitution. To permit the mandate to be handed down and the convictions to become final would destroy the Supreme Court jurisdiction to review by mooting the case and requiring the appellees to suffer the penalties of conviction thereunder and would deny the appellees the right of Supreme Court review.

4. The balance of equities favor the relief requested since the state will suffer no harm by review of this basic question.

/s/ Arthur Dale Leach
Attorney for Appellees

STATE OF MARYLAND Appellant vs. RAYMOND G. DEVERS and BRYAN D. WEBSTER	IN THE COURT OF APPEALS OF MARYLAND SEPTEMBER TERM, 1970 NO. 200

ORDER

Upon consideration of the motion for stay of mandate filed in the above entitled case, it is this 9th day of February, 1971

ORDERED by the Court of Appeals of Maryland that the mandate be, and it is hereby, stayed pending application for review of the decision of this Court to the Supreme Court

of the United States, and until final decision by that Court unless otherwise ordered by this Court or by the Supreme Court of the United States, provided such application for review by timely filed.

/s/ Hall Hammond
Chief Judge

APPENDIX D

Fourteenth Amendment to the Constitution of the United States:

> "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

APPENDIX E

ANNOTATED CODE OF MARYLAND

§ 593. Jury to be judges of law and fact; motion for judgment of acquittal on ground of insufficiency of evidence.

In the trial of all criminal cases, the jury shall be the judges of law, as well as of fact, except that at the conclusion of the evidence for the State a motion for judgment of acquittal on one or more counts, or on one or more degrees of an offense, may be made by an accused on the ground that the evidence is insufficient in law to justify his conviction as to any such count or degree. If the motion is denied, he may offer evidence on his own behalf without having reserved the right to do so, but by so doing, he withdraws his motion. The motion may be made at the close of all the evidence whether or not such motion was made at the conclusion of the evidence for the State. If the motion is denied the defendant may have a review of such ruling on appeal. (An. Code, 1951, § 700; 1949, ch. 596, § 655A; 1963, ch. 558, § 6; 1967, ch. 213.)

Rule 755. Motion for Judgment of Acquittal.

a. *Supersedes Motion for Directed Verdict.*

The motion for a directed verdict of not guilty and the motion for an instruction that the evidence is insufficient in law to sustain a conviction are abolished and the motion for judgment of acquittal shall be used in their place. (Cf. Rule 738, G.R.P.P. Pt. Four, I, Rule 5A, & Uniform Rule 38.)

b. *When Made.*

A motion for judgment of acquittal on one or more counts, or one or more degrees of an offense, may be made by an accused at the close of the evidence offered by the State, or may be made at the close of all the evidence, whether or not such motion was made at the close of the

evidence offered by the State. If the motion is not granted at the close of the evidence offered by the State, the accused may offer evidence without having reserved the right to do so, but by so doing, he withdraws his motion.

Rule 759. Motions After Verdict.

a. *Motion for New Trial.*

A motion for a new trial shall be made pursuant to Rule 567 (New Trial). A motion for a new trial shall be heard by the court in which the motion is pending. The Court may grant a new trial if required in the interest of justice.